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NEW JERSEY LAW REPORTS.

VOLUME XXX.

VROOM I.



REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT,

AND THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

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**PETER D. VROOM, Reporter.**  
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References show where the cases herein reported have been cited, affirmed, or overruled, down to Part I., Vol. 41, N. J. Law Reports (12 Vroom), and Part I., Vol. 31, N. J. Equity Reports (4 Stewart), inclusive.

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“ EDMUND L. B. WALES, from March 19, 1863.

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A TABLE OF CASES

REPORTED IN THIS VOLUME.

A.		Chambers ads. Grant & Kelly... 323
Adams and Traphagen v. Ross..	505	Chase et al. ads. City of Jersey
Adrian ads. Howland.....	41	City..... 233
Assessor, Fourth Ward, Newark,		City of Elizabeth ads. State,
ads. Newark City Bank.....	13	Woodruff, pros..... 176
Assessor, Fourth Ward, Newark,		City of Elizabeth ads. State,
ads. Wallen.....	ib.	Hand, pros..... 365
Aycrigg's Ex'rs v. New York		City of Hoboken v. Harrison et al. 73
and Erie Railroad.....	460	City of Hoboken ads. State, Ho-
		boken and Weehawken H.
		R. R. Co., pros..... 225
B.		City of Jersey City ads. State,
Babcock ads. State.....	29	Piard et al., pros..... 148
Barker ads. Read.. ..	378	City of Jersey City v. Chase et al.. 233
Barnes ads. Handlong	69	City of Jersey City ads. State,
Beale v. Berryman.....	216	Howeth, pros
Beardley ads. Meyer	236	City of Jersey City ads. State,
Beneficial Society of Burlington		Malone, pros..... 250
v. White.....	313	City of Newark ads. State, Doyle,
Bergen ads. Staats.....	131	pros
Berry v. Doremus.....	399	City of Newark v. Board of Edu-
Berryman ads. Beale.....	216	cation
Betts v. Francis.....	152	City of New Brunswick ads.
Board of Education of Newark		State, Parker, pros..... 395
ads. City of Newark.....	374	Clerk of Hudson county ads.
Bond et al. v. Cox	381	Fleming..... 280
Bowne ads. Titus & Scudder....	340	Clevinger ads. Town of Lam-
Brain v. Snyder.....	56	bertville..... 53
Bridges and Boyle ads. Mechan-		Clothier ads. State, Fennimore,
ics and Traders Bank.....	112	pros.
Bridges and Boyle ads. Rogers..	ib.	Colwell and Cavalier ads. Farrel, 123
Brooks ads. State	356	Conover ads. Thompson and
Bush ads. Doremus.....	85	Petty..... 329
		Cook v. Smith..... 387
		Cooley et al. ads. Ordinary..... 179
		Cooley and West ads. Ordinary.. 271
		Corlies v. Fleming and Corlies... 349
		Coulter v. Kaighn and Cooper... 98
		Cox ads. Bond et al..... 381
C.		
Callahan v. Township of Morris,	160	
Casson ads. Kirkpatrick.....	331	
Chadwick ads. Ortley.....	35	

Cramer et al. ads. Reford.....	250	Haight ads. State, Jersey City and Bergen R. R. Co., pros..	447
Crozer ads. Sutphin.....	257	Haines v. Dubois.....	259
D.		Haley ads. Dow.....	354
Davis ads. Lyons and Bennett...	301	Hallam ads. State, Gloucester Manufacturing Company, pros.....	405
Delaware, Lackawanna, and Western R. R. Co. ads. State,	473	Hallam ads. State, Washington Manufacturing Company, pros.....	421
Denny ads. State, Camden and Phila. Ferry Co., pros.....	421	Handlong v. Barnes.....	69
Donahay ads. State, Winsor, pros.....	404	Harrison et al. ads. City of Ho- boken	73
Doremus ads. Berry.	399	Harwood ads. Smithurst.....	230
Doremus v. Bush	85	Hinchman and Hopper ads. Rutan	255
Dow v. Haley.....	354	Hoagland v. Veghte.....	516
Drake ads. State	422	Hoboken City Bank ads. Over- man	61
Dubois ads. Haines.....	259	Hoffman ads. State, Apgar, pros..	346
E.		Houghtalin ads. Graham	552
Elkinton and Ferguson ads. State.....	335	Howell ads. Green	326
F.		Howland v. Adrain.....	41
Farmers and Mechanics Bank v. Green	316	Hudson County ads. State.....	137
Farrel v. Colwell and Cavalier..	123	J.	
Fleming v. Clerk of Hudson county.....	280	Janeway v. Skeritt.....	97
Fleming and Corlies ads. Corlies,	349	Johnson ads. State.....	185
Francis ads. Betts.....	152	Johnson ads. State, Warne, pros..	452
Fulton ads. Stall.....	430	Jones v. Vail.....	135
G.		K.	
Graham v. Houghtalin.....	552	Kaighn and Cooper ads. Coulter,	98
Frant & Kelly v. Chambers	323	Kirkpatrick v. Cason.....	331
Green ads. Farmers and Mechan- ics Bank.....	316	L.	
Green v. Howell	326	Lawson ads. Tyler	120
H.		Lyons and Bennett v. Davis.....	301
Haight ads. State, New York and Erie R. R. Co., pros....	428	M.	
Haight ads. State, Jersey City and Bergen Plank Road Co., pros.....	443	Manning et al. ads. Yawger.....	182
I.		Martin ads. Nevius.....	465
J.		Mechanics and Traders Bank v. Bridges and Boyle.....	112
K.		Meyer v. Beardsley.....	236

Miller ads. State, Morris and Essex Railroad Co., pros..	368	Ryerson ads. State, Van Riper, pros.....	268
N.		S.	
Nevius v. Martin.....	465	Serrell ads. Perrine.....	454
Newark City Bank v. Assessor, Fourth Ward, Newark.....	13	Sip ads. Taylor and Thomson...	284
New York and Erie Railway Co. ads. Aycrigg's Ex'rs.....	460	Skerritt ads. Janeway.....	97
New York and Erie Railway Co. ads. State.....	473	Slack v. Reeder.....	348
Nixon v. Ruple.....	58	Smethurst v. Harwood.....	230
Northern Railroad Company ads. Telfer.....	188	Smith ads. Cook.....	387
O.		Smith ads. State, Allen, pros.....	449
Ordinary v. Cooley et al.....	179	Snedeker ads. State, Snedeker, pros.....	80
Ordinary v. Cooley and West...	271	Snyder ads. Brain.....	56
Ortley v. Chadwick.....	35	Stall v. Fulton.....	430
Overman v. Hoboken City Bank,	61	Staats v. Bergen.....	131
P.		State v. Babcock.....	29
Parker v. Thompson.....	311	State v. Brooks.....	356
Parsell v. State, Mann et al., pros.....	530	State v. Delaware, Lackawanna, and Western Railroad.....	473
Perrine v. Serrell.....	454	State v. Drake.....	422
R.		State v. Elkinton and Ferguson..	335
Randall and Morrell v. Roche and Creede.....	220	State v. Hudson county.....	137
Read v. Barker.....	378	State v. Johnson.....	185
Reford v. Cramer et al.....	250	State v. New York and Erie Railway Co.....	473
Reeder ads. Slack.....	348	State v. Stone.....	299
Reeves ads. Tice.....	314	State v. Williams.....	102
Richards ads. State, Pavonia Ferry Co., pros.....	266	State, Allen, pros., v. Smith.....	449
Roche and Creede ads. Randall and Morrell... ..	220	State, Apgar, pros., v. Hoffman..	346
Rogers v. Bridges and Boyle....	112	State, Camden and Philadelphia Ferry Co., pros., v. Denny..	421
Ross ads. Adams and Traphagen,	505	State, Camden Water Works Co., pros., v. Rudderow.....	421
Rudderow ads. State, Camden Water Works Co., pros.....	421	State, Doyle, pros., v. City of Newark	303
Rudderow ads. State, West Jersey Ferry Co., pros.....	ib.	State, Fennimore, pros., v. Clothier	351
Ruple ads. Nixon.....	58	State, Gloucester Manufacturing Co., pros., v. Hallam.....	405
Rutan v. Hinchman and Hopper,	255	State, Hand, pros., v. City of Elizabeth.....	365
		State, Hoboken and Weehawken Horse Railroad Co., pros., v. City of Hoboken.....	225
		State, Howeth, pros., v. City of Jersey City.....	93, 521

State, Jersey City and Bergen Plank Road Co., pros., v. Haight	443	T.	
State, Jersey City and Bergen Railroad Co., pros., v. Haight	447	Taylor and Thomson v. Sip.....	284
State, Kaighn's Point Ferry Co., pros., v. Vantier.....	421	Telfer v. Northern Railroad Company.....	188
State, Malone, pros., v. City of Jersey City.....	250	Thompson ads. Parker.....	311
State, Malone, pros., v. Water Commissioners	247	Thompson and Petty v. Conover,	329
State, Mann et al., pros., ads. Parsell.....	530	Tice v. Reeves.....	314
State, Morris and Essex Railroad Co., pros., v. Miller.....	368	Titus & Scudder v. Bowne.....	340
State, New York and Erie Railway Co., pros., v. Haight....	428	Town of Bergen ads. State, Vanhorn, pros.....	307
State, Parker, pros., v. City of New Brunswick.....	395	Town of Lambertville v. Clevinger	53
State, Pavonia Ferry Co., pros., v. Richards.	266	Township of Morris ads. Callahan	160
State, Piard, pros., v. City of Jersey City	148	Tyler v. Lawson.....	120
State, Piard, pros., v. Water Commissioners	148	V.	
State, Snedeker, pros., v. Snedeker.....	80	Vail ads. Jones.....	135
State, Vanhorn, pros., v. Town of Bergen.....	307	Vantier ads. State, Kaighn's Point Ferry Co., pros.....	421
State, Van Riper, pros., v. Ryerson.....	268	Veghte ads. Hoagland.....	516
State, Warne, pros., v. Johnson	452	W.	
State, Washington Manufacturing Co., pros., v. Hallam.....	421	Wallen v. Assessor, Fourth Ward, Newark.....	13
State, West Jersey Ferry Co., pros., v. Rudderow	421	Water Commissioners ads. State, Malone, pros	247
State, Winsor, pros., v. Donahay,	404	Water Commissioners ads. State, Piard, pros.	148
State, Woodruff, pros., v. City of Elizabeth.....	176	Westcott ads. Wroge	212
Stone ads. State.....	299	White ads. Beneficial Society of Burlington.....	313
Sutphin v. Crozer.....	257	Williams ads. State	102
		Wroge v. Westcott	212
		Y.	
		Yawger v. Manning et al.....	183

A TABLE OF CASES

CITED IN THIS VOLUME.

A.

Adams v. Jones.....	12 Pet. 207.....	69
Adams v. Wordley.....	1 M. & W. 374.....	239, 241
Addison v. Overend.....	6 T. R. 766.....	129
Alcock v. Alcock.....	12 Eng. L. & E. 354.....	71
Aldrich v. Kinney.....	4 Conn. 380.....	217
Allen v. Newberry.....	21 How. 245.....	224
Almy v. California.....	24 How. 169.....	479, 499
Apothecary Co. v. Beatty.....	Ryan & M. 159.....	355
Aubles v. Mason.....	11 Casey 261.....	438
Ayers v. Van Lieu.....	2 South. 765.....	303
Aymar v. Sheldon.....	12 Wend. 439.....	44

B.

Bank of Rutland v. Buck.....	5 Wend. 66.....	240
Bank of U. S. v. Davis.....	2 Hill 451.....	46
Barley's Case.....	Cro. Eliz. 296.....	186
Barbat v. Allen.....	7 Exch. 609.....	72
Bark Chusan.....	2 Story 461.....	222
Barker v. Dixie.....	Cas. Temp. Hard. 264.....	70
Batthews v. Galindo.....	3 C. & P. 238.....	70
Beals v. Peck.....	12 Barb. 250.....	51
Bentley v. Cooke.....	3 Doug. 422.....	70
Bessell v. Briggs.....	9 Mass. 462.....	218
Birbeck v. Ferry Boats.....	17 Johns. 54.....	221
Blake v. Midland Railway.....	18 Q. B. 93.....	200
Blanchard v. Brook.....	12 Pick. 67.....	509
Bloxam v. Hubbard.....	5 East. 407.....	129
Boqua v. Ware.....	1 Halst. 151.....	232
Boyce v. Edwards.....	4 Pet. 111.....	69
Boydell v. Drummond.....	11 East. 142.....	403
Boylan ads. Meeker.....	4 Dutch. 309.....	55
Bracegirdle v. Heald.....	1 B. & A. 722.....	403
Bradford's Appeal.....	5 Casey 513.....	438
Brashford v. Buckingham.....	Cro. Jac. 77, 205.....	440
Broadwell v. Getman.....	2 Denio 87.....	403
Broderick ads. Ames.....	3 Harr. 297.....	232
Brown v. Butchers Bank.....	6 Hill 443.....	260

Brown v. Maryland.....	12 Wheat. 419.....	479, 492
Brown v. Selwin.....	Cas. Temp. Talb. 210.....	468
Brown v. Selwin.....	Bro. Parl. Cases 607.....	468
Buckley v. Collier.....	1 Salk. 114.....	440
Bullis v. Giddins.....	8 Johns. 82.....	220
Burgess v. Vreeland.....	4 Zab. 74.....	46, 51, 263
Burrell v. Bull.....	3 Sandf. Ch. 15.....	71

C.

Caldwell v. Fifield.....	4 Zab. 152.....	332
Carrigan v. Morrison.....	2 Mete. 381.....	69
Campfield v. Johnson.....	1 Zab. 83.....	55
Carrol v. Upton.....	2 Sand. Sup. Ct. 172.....	44
Carrol v. Upton.....	3 Coms. 272.....	44
Carron v. Martin.....	2 Dutch. 600.....	60
Carter's Ex'rs v. Rutland.....	1 Hayw. 2.....	156, 159
Case of Beverhan et al.....	4 City Hall Rec. 138.....	363
Cayuga Bank v. Worden.....	1 Coms. 417.....	44
Cayuga Bank v. Worden.....	2 Seld. 19.....	44
Central Bank v. Peterson.....	4 Zab. 668.....	333
Central R. R. Co. v. Moore.....	4 Zab. 830.....	461
Chambers v. Wambaugh.....	4 Dutch. 531.....	55
Cherry v. Heming.....	4 Ex. 631.....	403
Clark v. Cock.....	4 East. 57.....	69
Coffin v. Merril.....	22 N. H. 356.....	441
Collins v. Loftus.....	10 Leigh 10.....	156
Cooley v. Philadelphia.....	12 How. 299.....	478
Coolidge v. Payson.....	2 Wheat. 66.....	69
Com. v. Harrington.....	3 Pick. 28.....	106
Com. v. McGeorge.....	6 B. Mon. 21.....	110
Comstock v. Bayford.....	12 Smed. & M. 369.....	441
Cook v. State.....	4 Zab. 486.....	187

D.

Dagley v. Telferry.....	1 P. Wms. 285.....	567
Davis v. Dinwoody.....	4 T. R. 678.....	70
Davis v. Hendrickson.....	3 Gr. R. 481.....	385
Den v. Cubberly.....	7 Halst. 308.....	468
Disborough v. Bidleman.....	Spencer 275.....	351
Disborough v. Bidleman.....	1 Zab. 677.....	351
Dixon's Adm'r v. Dixon.....	18 Ohio 15.....	441
Doe v. Martin.....	4 T. R. 39.....	513
Donellan v. Read.....	3 B. & Ad. 889.....	403
Durant v. Jersey City.....	1 Dutch. 309.....	367

E.

E. & N. E. Railroad Co. v. Casey.....	26 Penna. 301.....	370
---------------------------------------	--------------------	-----

CASES CITED.

xv

Erwin v. Smaller.....	2 Sandf. S. C. 340.....	70
Ex parte Jennings.....	6 Wend. 518.....	338
Ex parte Rogers.....	7 Wend. 526.....	338

F.

Farnham v. Ingham.....	5 Ver. 114.....	239
Farrel v. Perry.....	1 Hayw. 2.....	156, 159
Faulkner's Case.....	1 Sandf. 248.....	105
Fenton v. Emblers.....	3 Burr. 1278.....	403
Finch v. Gregory's Ex'rs.....	25 Wend. 469.....	356
Fountain v. Smith.....	2 Sid. 128.....	440
Ford v. Aiken.....	4 Rich. 133.....	156, 159
Ford v. Monroe	2 Wend. 210.....	201

G.

Gamber v. Gamber.....	6 Harris 366.....	438
Garrabrant v. Sigler.....	1 Halst. Dig. 507, § 6.....	569
Gater's Ex'rs v. Madeley.....	6 M. & W. 423.....	441
Gibbons v. Ogden.....	9 Wheat. 1.....	479, 492
Gibson v. Powell.....	6 Miss. 60.....	262
Gilleland v. Rappleyea.....	3 Green. 145.....	546
Gilmore v. Lewis.....	4 Zab. 223.....	219
Goodwin v. McCoy.....	13 Ala. 261.....	239
Gregory's Case.....	6 Rep. 20.....	116

H.

Haines v. Campion.....	3 Harr. 51.....	250, 306
Hall v. The State.....	4 Harr. 145.....	109
Hall v. Young.....	37 N. H. 146, 437.....	441
Hamilton v. Chevallier.....	3 Harr. 434.....	385
Hand v. Hoffman.....	3 Halst. 71.....	468
Handley's Lessee v. Anthony.....	5 Wheat. 374.....	33
Harcourt v. Meeks.....	5 Mod. 77.....	232
Hardcastle v. State.....	3 Dutch. 352.....	405
Harman v. Com.....	12 S. & R. 71.....	187
Harrison v. Ruscoe.....	15 M. & W. 251.....	46
Hanson v. Stetson.....	5 Pick. 506.....	239
Hartley v. Case.....	4 B. & C. 339.....	44, 51
Hasbrouck v. Vandervoort.....	4 Sandf. S. C. 599.....	70
Hasbrouck v. Vandervoort.....	5 Seld. 157.....	71
Hawkesworth v. Showler.....	12 M. & W. 45.....	71
Haynes v. Birks.....	3 Bos. & Pul. 599.....	46
Heaverin v. Donnell.....	7 Smedes & Mar. 244.....	239
Heirs of Holmes v. Adm'r of Holmes,	28 Vt. 356.....	441
Hick v. Keats.....	4 B. & C. 71.....	158
Hill v. Hunt.....	Spencer 477.....	343

Hengland v. Veghte.....	3 Zab. 92.....	518
Hoare v. Graham.....	3 Camp. 57.....	239
Hoboken v. Harrison.....	1 Vroom 73.....	181
Hoby v. Roebuck.....	7 Taunt. 157.....	403
Hodges v. Shouler.....	22 N. Y. 118.....	45
Holdfast v. Dowling.....	2 Str. 1253.....	71
Hollowell v. Spinner.....	4 Iredell 165.....	156, 159
Holmes v. Jersey City.....	1 Beas. 299.....	96, 524
Home Insurance Co. v. Green.....	19 N. Y. 519.....	44, 51
Hossack v. Rogers.....	8 Paige 229, 241.....	70
Howard v. Ives.....	1 Hill 263.....	48
Howland v. Adrain.....	1 Vroom 41.....	261
Huncke v. Francis.....	3 Dutch. 55.....	258

I.

In the matter of Abraham Coursen's will.....	3 Green Ch. 412.....	569
In re Brown.....	2 Story 502.....	290

J.

Jackson v. Miller.....	1 Dutch. 93.....	70
Jackson v. Sill.....	11 Johns. 201.....	468
Jackson v. Steamboat Magnolia.....	20 How. 393.....	222
Jersey City v. Morris Canal & B. Co..	1 Beas. 548.....	526
Jenne v. Ward.....	2 Stark. 326.....	66
Joel v. Morrison.....	6 C. & P. 501.....	463
Johnson v. Collings.....	1 East. 98.....	69
Johnson v. Martinus.....	4 Halst. 144.....	239
Jones v. Pope.....	1 Saund. 38.....	219

K.

Keene v. Macey.....	4 Bibb 35.....	155, 158
Keeny v. Good.....	9 Harris 354.....	438
Kilgore v. Bulkley.....	14 Conn. 362.....	44
King v. Moore.....	3 B. & Ad. 184.....	105
King v. Pease.....	4 B. & A. 30.....	203
King v. Rogier.....	1 B. & C. 72.....	105
King v. Stone.....	6 T. R. 531.....	359
King v. Taylor.....	3 B. & C. 72.....	105
King v. Yorkshire.....	2 East. 342.....	138
Kip v. Chamberlain.....	Spencer 656.....	343
Kutzmeyer v. Emma.....	3 Dutch. 372.....	308

L.

Langdale v. Trimmer.....	15 East. 291.....	46
Langforth Bridge Case.....	Crab. Cas. 365.....	138

License Cases.....	5 How. 504.....	479, 495
Ludlam v. Broderick.....	3 Gr. 276.....	460
Lyon v. King.....	11 Metc. 411.....	403

M.

Maguire v. Card.....	21 How. 249.....	224
Mann v. Mann.....	14 Johns. 1.....	468
Manning v. Randolph.....	1 South. 145.....	403
Many v. Noyes.....	5 Hill 34.....	221
Martyn Page's Case.....	Cro. Car. 332.....	186
McCulloch v. Maryland.....	4 Wheat. 316.....	17, 492
Mason v. Hunt.....	Doug. 297.....	68
McKnight v. Lewis.....	5 Barb. 681.....	44
Mellesch v. Rippen.....	11 Eng. L. & E. 599.....	52
Mechanics Bank v. Bridges.....	1 Vroom 112.....	371
Mendham v. Losey.....	Penn. 347.....	165
Merchants Bank v. Spicer.....	6 Wend. 445.....	260, 293
Merriam v. Railroad Co.....	20 Conn. 354.....	72
Merrick v. Avery.....	14 Ark. 378.....	222
Middletown v. Fowler.....	1 Salk. 282.....	463
Mills' Case.....	5 City Hall Rec. 78.....	363
Mills v. Bank of U. S.....	11 Wheat. 431.....	44
Miners Bank v. U. S.....	1 Greene (Iowa) 553.....	371
Mohawk Bank v. Broderick.....	10 Wend. 304.....	290, 295
Mohawk Bank v. Broderick.....	13 Wend. 134.....	290, 295
Montfort v. Vanarsdalen.....	2 South. 686.....	312
Moore v. Central R. R. Co.....	4 Zab. 268, 853.....	199
Moore v. Hamilton.....	4 Zab. 532.....	549
Moses v. Thornton.....	8 T. R. 307.....	354
Moule v. Brown.....	4 Bing. N. C. 266.....	291
Moulin v. Insurance Co.....	4 Zab. 223.....	219
Murray v. Judith.....	6 Cowen 490.....	293
Myer v. Hollingsworth.....	2 Dutch. 187.....	73

N.

Newark City Bank v. Assessor.....	1 Vroom 13.....	117
-----------------------------------	-----------------	-----

O.

O'Connor v. Majoribanks.....	4 Man. & Gr. 435.....	71
Oliver v. Phelps.....	Spencer 180.....	460
Owen v. Arvis.....	2 Dutch. 23.....	129

P.

Park v. Mayor of New York.....	3 Coms. 489.....	201
Partridge v. Davis.....	20 Vt. 499.....	260
Passenger Cases.....	7 How. 464.....	477, 479, 495
Paterson v. Everard.....	2 Chitty R. 239.....	219

Pendleton v. Franklyn.....	3 Seld. 508.....	221
Pennsylvania v. Wheeling, &c., Bridge Co.....	13 How. 518.....	496
People v. Com. of Taxes.....	23 N. Y. 192.....	18
People v. Erwin & Clark.....	4 Denio 129.....	106
People v. Jackson.....	2 Hill 92.....	186
People v. Mercein.....	8 Paige 47.....	70
People v. White.....	22 Wend. 176.....	186
Phillipsburg Bank v. R. R. Co.....	3 Dutch. 206.....	477
Pierson v. Dunlop.....	Cowp. 571.....	69
Powell v. Waters.....	17 Johns. 176.....	240
Prat et ux. v. Taylor.....	Cro. Eliz. 61.....	410
Price v. Sessions.....	3 How. 624.....	441

Q.

Quicksall, Adm'r, v. Quicksall.....	2 Penn. 457.....	312
Quinn v. Moore.....	15 N. Y. 534.....	200

R.

Randolph v. Montfort.....	1 Harr. 226.....	184
Rawdon v. Redfield.....	2 Sand. S. C. 178.....	47
Reedy v. Seixas.....	2 Johns. C. 337.....	44
Regina v. Inhab. of Wilts.....	6 Mod. 307.....	143
Rex v. Bigg.....	3 P. Wms. 419, 428.....	262
Rex v. Button.....	11 A. & E. (N. S.) 929.....	111
Rex v. Cliviger.....	2 T. R. 263.....	71
Rex v. Dawson.....	3 Stark. 62.....	187
Rex v. Webster.....	Str. 1137.....	186
Richardson, Adm'r, v. Morrill.....	32 Vt. 27.....	441
Rickford v. Ridge.....	2 Camp. 537.....	291
Ridgway v. English.....	2 Zab. 409.....	155
Ridout v. Bristow.....	1 Tyrw. 84.....	239
Rinnell v. Sampayo.....	1 C. & P. 255.....	462
Robinson v. Reynolds.....	2 Q. B. 196.....	240
Robson v. Bennett.....	2 Tamm. 388.....	46, 63
Rochester Bank v. Gould.....	9 Wend. 279.....	51
Ross v. Adams.....	4 Dutch. 160.....	436
Roxton v. Central R. R. Co.....	1 Dutch. 556.....	199
Rumell v. Early.....	13 Ala. 131.....	463
Russell v. Wiggins.....	2 Story 237.....	69

S.

Saddle River v. Colfax.....	1 Halst. 115.....	165
Sayre v. Flannery.....	3 Kelly (G.) 550.....	441
Schmelpennich v. Bayard.....	1 Pet. 284.....	69
Scott v. Beatty.....	3 Zab. 269.....	550
Sedgeworth v. Overend.....	7 T. R. 279.....	129

Seiple v. Elizabeth.....	3 Dutch. 410.....	78
Sheldon v. Clark.....	1 Johns. 513.....	355
Shelley's Case.....	1 Rep. 93.....	512
Shelton v. Braithwaite.....	7 M. & W. 436.....	45
Shelton v. Braithwaite.....	8 M. & W. 252.....	45
Sinnot v. Davenport.....	22 How. 227.....	496
Slaughter's Adm'r v. Tutt.....	12 Leigh 156.....	156
Sleath v. Wilson.....	6 C. & P. 607.....	463
Smick v. Opdycke.....	7 Halst. 347.....	253
Smith v. Boulton.....	1 Hart & Waln 3.....	52
Smith v. Commonwealth.....	6 B. Mon. 21.....	110
Smith v. James.....	20 Wend. 192.....	291
Smith v. Knox.....	3 Esp. R. 46.....	240
Smith v. Montgomery.....	5 Wend. 504.....	159
Smith v. Smith.....	4 Dutch. 208.....	256
Smith v. Wertall.....	1 Ld. Ray. 316.....	403
Snow v. Curtis.....	2 Mich. 238.....	51
Snyder v. Snyder.....	6 Binn. 483.....	70
Solarte v. Palmer.....	7 Bing. 530.....	51
Spaulding v. Alford.....	1 Pick. 33.....	355
Spencer v. Bank of Salina.....	3 Hill 520.....	48
Spring v. Lovett.....	11 Pick. 416.....	239
Stapleton v. Crofts.....	18 Q. B. 367.....	71
State v. Atkinson.....	3 Dutch. 420.....	534, 543
State v. Bentley.....	3 Zab. 532.....	20, 370
State v. Bergen.....	1 Zab. 344.....	547
State v. Bergen.....	5 Dutch. 266.....	308
State v. Brannin.....	3 Zab. 484.....	20, 115
State v. Cake.....	4 Zab. 517.....	451
State v. City of Hudson.....	5 Dutch. 475.....	306
State v. Davis.....	1 Dutch. 386.....	33
State v. Elmer.....	Coxe 55.....	542
State v. Everit.....	3 Zab. 379.....	250, 306
State v. Gibbons.....	1 South. 40.....	427
State v. Guild.....	5 Halst. 180.....	362
State v. Hamilton et al.....	5 Halst. 190.....	234
State v. Holliday.....	3 Halst. 205.....	338
State v. Jersey City.....	2 Dutch. 444.....	306
State v. Jersey City.....	5 Dutch. 441.....	150, 525
State v. Kingsland.....	3 Zab. 85.....	250, 306
State v. Miller.....	3 Zab. 383.....	55
State v. Minton.....	3 Zab. 529.....	115, 370
State v. Newark.....	1 Dutch. 400.....	306
State v. Ten Eyck.....	3 Harr. 373.....	250
State v. Van Buskirk.....	1 Zab. 87.....	547
State v. Vanderveer.....	1 Dutch. 233.....	547
State v. Van Winkle.....	1 Dutch. 73.....	405
State v. Water Commissioners... ..	1 Vroom 247.....	306

State v. Willingborough Road.....	Coxe 128	542
State v. Woodward.....	4 Halst. 21.....	250, 306
Stearns v. Adm'r of Stearns.....	30 Vt. 213.....	441
Stein v. Bowman.....	13 Pet. 221.....	71
Stokes v. Middleton.....	4 Dutch. 32.....	576
Stratton v. Breath.....	7 M. & W. 436.....	52
Susquehanna Bridge Co. v. Evans.....	4 Wash. C. C. 480.....	239
Sussex Bank v. Baldwin.....	2 Harr. 487.....	46

T.

Talmadge v. R. & S. R. R. Co.....	13 Barb. 498.....	403
Tanner v. Trustees of Albion.....	5 Hill 121.....	105
Taylor v. Caryl	20 How. 583.....	222
The Globe.....	2 Blatch. C. C. 430.....	222
The Virgin.....	8 Pet. 538.....	222
Thomas v. Osborn.....	19 How. 22.....	222
Tiley v. Cowling.....	1 Ld. Ray. 744	71
Toply v. Toply.....	7 Casey 323.....	428
Town of Wigan v. Pilkington.....	1 Keble 597.	282
Trustees v. McFarlan.....	2 Green 471.....	55
Tucker v. Seaman's Aid Soc.....	7 Mete. 189.....	468
Turner v. Leach.....	4 B. & A. 451.....	46
Tyler v. Hand.....	7 How. 581.....	78

U.

United States v. Bradley.....	10 Pet. 361.....	78
United States v. Tingey.....	5 Pet. 129.....	78

V.

Van Schoick v. Canal Co.	Spencer 249.....	518
Voorhees v. Bank of U. S.....	10 Pet. 472	576

W.

Wade v. Potter.....	2 Green 278	312
Walker v. Blackwell.....	1 Wend. 557.....	221
Wallace v. Agry et al.....	4 Mason 118, 336.....	291
Wallace v. Coil.....	4 Zab. 602	254, 385
Watkins v. Kirkpatrick	2 Dutch. 84.....	239
Weller v. Baker.....	2 Wils. 414	440
Weston v. City of Charleston.....	2 Pet. 449.....	16
Williams' Case.....	1 Civ. Hall Rec. 149	363
Wilson v. Blackbird Creek Co.....	2 Pet. 245	498
Windham v. Chetwynd	1 Burr. 428	70
Wire v. Browning.....	Spencer 364.....	343

Woodbridge v. Spooner.....	3 B. & A. 223.....	239
Woodruff v. Daggett.....	Spencer 526.....	50
Woolwich v. Forrest.....	Penn. 115.....	78, 181
Wright v. Green.....	6 Halst. 334.....	546

Y.

Yarborough v. Bank of England.....	16 East. 6.....	262
Youngs v. Lee.....	2 Kern. 554.....	51

CASES DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW JERSEY,
AT JUNE TERM, 1862.

THE NEWARK CITY BANK v. THE ASSESSOR OF THE
FOURTH WARD OF THE CITY OF NEWARK.

CHARLES A. WALLEN v. THE SAME.

1. The bonds issued by this state under the act of 1861 (*Laws* 1861, p. 554,) are exempt from taxation when held by individuals or corporations.
 2. The stocks and securities issued by the United States under the power to borrow money are exempt from state taxation in the hands of individuals or corporations.
 3. Stocks in foreign corporations, held by individuals resident in this state, are personal estate within this state, and subject to taxation.
 4. Corporations are entitled to have deducted from the amount of their capital stock paid in, and accumulated surplus, the amount of the bonds of this state and the stock and public securities issued by the United States owned by them at the time of assessment.
-

On *certiorari*. In matter of assessment.

Argued before the CHIEF JUSTICE and Justices ELMER,
VREDENBURGH, and VAN DYKE.

For the plaintiff, *J. P. Bradley* and *A. O. Zabriskie*.

For the defendants, *Frelinghuysen*, Attorney General.

Newark City Bank v. The Assessor.

CHIEF JUSTICE. These *certioraris* have been regularly issued and returned to this court, and have brought before us the records of assessments just made against the respective plaintiffs. The duplicates still remain in the hands of the assessor, the time for their return to the collector not having arrived. There has, of course, been no time for an appeal to the commissioners of appeal to correct the errors complained of. No motion was made to dismiss these *certioraris* as improvidently and prematurely issued; on the contrary, they have been elaborately argued by the counsel of the respective parties upon the merits, for the avowed purpose of obtaining at this time, before the assessments are completed throughout the state, the opinion of this court upon the important questions involved, to avoid the great public embarrassment that might ensue if, at this time, assessments should be made upon erroneous principles, and be, for that cause, generally reversed. Under these circumstances, we are not inclined, of our own motion, to dismiss these suits, but shall proceed to dispose of them upon their merits.

The cases were heard together, and as they involve the same points, it will be convenient to consider them at the same time.

In the City Bank case, the assessor returned that he had assessed that corporation—

On its capital stock, ...	\$350,000 00
On its accumulated surplus, ...	60,083 11
Total, ...	<u>\$410,083 11</u>

That the bank claimed a reduction of the same, because, as was shown and proved to the assessor, the capital and accumulated surplus comprised, among other things, United States 5 per cent. bonds—

Due in 1865, ...	\$5,000 00
United States 6 per cent. 1 year certificates, ...	122,000 00
United States 7 3-10 per cent. treasury notes, ...	73,000 00
Bonds of the state of New Jersey, under act of February 16th, 1861, ...	7,000 00
Total, ...	<u>\$207,000 00</u>

Newark City Bank v. The Assessor.

Which deduction the assessor disallowed, as contrary to law.

In the Wallen case, the assessment is—

Upon real estate, ...	\$20 00
Personal estate, ...	105 00
Total, ...	<u>\$125 00</u>

The personal estate consisted of—

Bonds and mortgages, ...	\$3,500 00
20 shares of capital stock, Ocean Bank, city of New York, ...	2,000 00
10 shares New York Central Railroad, ...	1,000 00
United States demand notes under the act of con- gress, February 25th, 1862, ...	2,000 00
New Jersey state bonds, under act of May 10th, 1861, ...	2,000 00
	<u>\$10,500 00</u>

The following points are involved, and must be decided :

1. Are the bonds of this state in the hands of Wallen taxable?
2. Are the United States bonds and notes in his hands taxable?
3. Are the railroad and bank stocks held by him taxable, being stocks of corporations without this state?
4. Is the bank taxable for all or any of the items disallowed as deductions from the capital stock and surplus, *viz.*, the New Jersey state bonds and United States bonds and notes?

The act of March 28th, 1862, introduced into our system of taxation extensive and radical alterations, for the purpose of more equally distributing upon persons and property the increased burthen of taxation, rendered necessary by the war for the preservation of the Union. The main design of these alterations was to extend, as far as practicable, the list of ratables, and to diminish, as much as possible, the number of non-taxable items composing the wealth of individuals and corporations, and in some instances to change

Newark City Bank v. The Assessor.

the mode of assessing that wealth, so as to reach it with more certainty than heretofore.

One of the most striking alterations is, that taxing the corporations themselves, instead of the stock in the hands of the stockholders, when they are corporations created by the state, and taxing their business done here, or capital employed here, when existing under charters granted by other states.

Out of these alterations spring more or less of the difficulty to be found in the solution of the questions presented for decision.

As to the first point, the taxability of the bonds of this state, there can be no doubt. By the act authorizing their issue they are expressly exempted from taxation, for the purpose of increasing their negotiability, and have been issued bearing on their face a statement that they are free from taxation.

The express contract of the state, that they shall be exempt (*Laws of 1861, p. 555,*) is enough to settle this question; and even as to those issued after the passage of the act under consideration the same rule must prevail. This exemption of these bonds was not intended to be affected by the general words of the act of 1862. New Jersey has always preserved unsullied her good faith, whenever it has been pledged, and her courts will never, by any nice refinement, open a way by which it may be violated.

2. The bonds and other evidences of debt issued by the United States, and held by Wallen, are, in his hands, exempt from taxation by state authority.

The case of *Weston and others v. City of Charleston*, 2 Pet. 449, is a decision directly upon this point, and, in my judgment, must control this case. That decision was not made by the court to turn upon the point, whether the taxation attempted by state authority was discriminating against the bonds of the United States, or whether they were taxed in the aggregate of the taxpayer's wealth. In the opinion of Chief Justice Marshall, the exemption of these bonds from

Newark City Bank v. The Assessor.

taxation by state authority was made to rest upon the ground that they were the means employed by congress, under the expressly granted power to borrow money, to effect that object; that a tax upon them was in substance and effect a state tax upon the exercise of one of the functions of government.

The tax in question is a tax upon the contract subsisting between the government and the individual; it bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract. In the exercise of the power to borrow money, the government applies directly to its citizens for the loan, without the intervention of state authority; it seeks no aid from the state, and is exempted from all control.

For this purpose it is supreme, and may make such contract as congress authorizes with the public creditor. It is essential to its exercise that the power should be entirely untrammelled by any burthen thrown upon it by state authority.

The same rule which would permit the credit of the United States to be taxed *inter alia* would logically permit its taxation by itself. It is not taxable because it does not exist by state permission, and is not protected by state laws, or subject to state sovereignty, by state legislation or otherwise. *McCulloch v. The State of Maryland*, 4 *Wheat.* 316.

To say that if only taxed in the bulk of the wealth of an individual, at the same rate as the rest of his property, there is no discrimination against the bonds, and that therefore the power to borrow money is not interfered with or, in any way crippled, does not touch the principle upon which the exemption of the national credit from state taxation rests. It only disposes of the argument *ab inconvenienti* against such taxation. It cannot be taxed at all because it is the contract of the national government, which, as to this, is paramount to that of the state over the same citizens. A taxation of the contract is an indirect taxation of the parties to

Newark City Bank v. The Assessor.

it. A state cannot tax a function of the federal government, whether dormant or in exercise, or the necessary means for its exercise, whether a parcel contract or one under seal. The inexorable law of political economy is, that the taxation of a sum of money loaned falls ultimately upon the borrower. The money loaned is in the federal treasury, the lender and his assigns have nothing but a voucher showing this fact. It is difficult to assign any better reason why a sum of money due the government from the collector of a port or of direct taxes may not be taxed by the state as part of the private property of the collector. It is not taxable because it is the money of the federal government, and not that of the collector. If the state may take it by the taxing power, it may take the whole or part at discretion.

It needs no argument to prove that, on such a theory, the existence of the federal government would be imperilled. It might be destroyed without treason or rebellion.

I am not satisfied with the reasoning of Denio, Judge, in *The People v. The Commissioners of Taxes and Assessments*, 23 N. Y. Rep. 192, in which the majority of the court concurred, holding United States bonds taxable, for the reasons I have already given. The positions I have stated were not, in *Weston v. City of Charleston*, *obiter dicta*; they were the very grounds of the decision.

The discriminating mind of Marshall could not have failed to perceive that the tax in that case was not one upon United States stock only, but upon all bonds of a certain grade, *including these*. He never would have been content to put the decision of that case on such narrow grounds.

That cannot be a sound rule which makes the thing taxable when taxed with the rest of a man's property of every kind, but untaxable when only taxed in common with a part. The court could not determine how universal a tax law must be to be operative, or how partial to be inoperative, nor inquire into the intent with which the tax was imposed. The Supreme Court of the United States had no alternative except to say the federal bonds cannot be taxed at all, or that to tax

Newark City Bank v. The Assessor.

them was unlawful, unless all other property was taxed at the same time, or when the design was to cripple the borrowing power of the federal government, which would lead, upon a question of constitutional law, into a vexatious inquiry into a mere intention, which could never be ascertained.

In addition to this view of the case, which seems conclusive, if the national credit in the hands of an individual is not of itself, from the nature of things, free from state taxation, it is clearly in the power of congress to make it so, either in the act authorizing the loan, or in a subsequent act. The power to make the loan carried with it the power to make all laws necessary for its success and protection when made. Congress must have the power to define the relations of citizens to the loan, and to exempt it from all state interference. The right of congress to exempt a national loan from taxation would seem as clear as that of a state to exempt its own. Both should have that power for very obvious reasons—the existence and exercise of the power might be vital to the success of the loan.

By the act of 25th of February, 1862, passed since the decision of the New York Court of Appeals, and probably in view of it, to correct the evils flowing from it, congress has, in the clearest possible language, declared that all stocks, bonds, and other securities of the United States, held by individuals, corporations, or associations within the United States, shall be exempt from taxation by or under state authority.

If, therefore, these bonds and securities have been taxed in the hands of Wallen, he is entitled to relief.

By act of March 28th, 1862, under consideration, it clearly appears that the bonds and securities are designed to be taxed as personal estate, and that the tax is not to be considered as either a capitation tax or an income tax.

The seventh section of the act declares that all real and personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation, &c.

The fifth section of the act declares that the persons and

Newark City Bank v. The Assessor.

property herein after specified shall be assessed and taxed as herein after provided.

The sixth section regulates the imposition of the personal or poll tax. Then follows the seventh section, already cited.

It is apparent, from these citations, that the bonds and securities are themselves taxed as personal estate, and that the tax is upon them as property.

As to the third point stated, I think Mr. Wallen is taxable upon the foreign railroad and bank stock.

The power of the legislature to tax extra territorial stocks, when owned by persons taxable in this state, has not been denied. It has been deliberately held by this court in the case of *The State v. Bravin*, 3 Zab. 484; *The State v. Bentley*, 3 Zab. 532. The only question is, has it been done by the act of 1862?

Several reasons have been assigned, from the provisions of the act, to show that, by it, taxation is strictly confined to personal estate within this state.

It is urged that, by the fifth section, taxes are to be laid on the persons and property in the act specified, as therein provided; that the seventh section expressly declares that all real and personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation, in the manner and subject to the exemptions therein specified, that is, in the act specified. It will be perceived that the argument goes to this extent, that no personal estate of any kind can be assessed unless within this state.

It would certainly be a remarkable result if the legislature, in its efforts to remodel the tax laws, so as to extend the range of taxation, and bring within its reach many things before exempt from taxation, had, by some strange oversight, exempted a class of property subject to taxation until the passage of the supplement of 1857. *Nix. Dig.* 802. When the act of 1862 was passed, the laws in force regulating the subjects of taxation were the acts of 1846, 1854, and the supplements of 1857 and 1861, the former supplement exempting from taxation all public stock and other property owned by

Newark City Bank v. The Assessor.

residents of this state subject to taxation in any other state, on which taxes shall actually be paid, the latter, the funds of certain charitable associations. *Nix. Dig.* 851 (802). The second section of this act of 1854 provided that all real and personal estate within this state, whether owned by individuals or corporations, should be liable to taxation.

The third section defined the meaning of the term real estate, as used in the act, to include all lands, all water power thereon, all buildings or erections thereon affixed to the same, trees and underwood growing thereon, and all mines, quarries, and all fisheries.

The fourth section defined the term personal estate, as used in the act, to include goods and chattels of every description, including steamboats and other vessels, money, debts due or owing from solvent debtors, whether on contract, note, bond, or mortgage, public stocks, and stocks in corporations, whether within or without this state.

The twenty-first section of the act of 1862 declared the first, second, tenth, and eleventh sections of the act of 1854, and also the fourth article of the fifth section of said act, and also the supplement of 1857, and all other acts and parts of acts, whether special or local, or otherwise inconsistent with the provisions of this act, repealed. This repealing clause, it will be seen on an examination of the act of 1854, leaves the third section, defining the meaning of the term real estate, the fourth section defining the meaning of the term personal estate, the first, second, and third subdivisions of the fifth section, specifying the property exempt from taxation, unrepealed.

All the sections and parts of sections, supplied and altered by the act of 1862, are thus repealed; and the remaining sections of the act, thus pointedly left unrepealed, relates to matters unregulated by the provisions of the act of 1862, such as the place where the personal tax shall be levied, the mode of making out the duplicates, the mode of assessing trustees, executors, administrators, and guardians, &c. Nothing can possibly be clearer than that the legislature

Newark City Bank v. The Assessor.

meant to say that the unrepealed portions of the act were not substantially inconsistent with the act of 1862, and should stand, except where modified by that act. If this be not so, there is no provision exempting the property of the United States, this state, counties, townships, cities, and boroughs, &c., from taxation, and many important matters are left without regulation. These acts are all supplements to the act of 1846, are all in *pari materia*, and to be construed together; and when one of these acts declares that a certain word or phrase is to be construed as meaning a certain thing in this act, the term this act, or equivalent language, means the original act and its supplement. In contemplation of law, this act and its supplements are but one act for the purpose of construction.

It results from this that the definitions of the terms *real and personal estate*, used in the act of 1854, are part and parcel of the act of 1862, and that stocks of corporations and public stocks, whether within this state or out of it, are taxable. If some new provision has been introduced in the act of 1862, plainly inconsistent with, and intended to supply the place of a corresponding provision of the act of 1854, the act of 1854 is *pro tanto* repealed. Of such a character is the provision of the 8th section, taxing domestic corporations and exempting their stockholders from taxation. By the act of 1854, foreign stocks are declared to be personal estate within this state, when owned by residents here. There is nothing in the act of 1862 inconsistent with this construction.

The act of 1854 declared personal estate *within* this state taxable, as the act of 1862 also does. The act of 1854, in substance, declares foreign stocks, when owned here, to be, for the purposes of taxation, within the state, and thus closes the door against legal casuistry. If anything could make this point clear, it is the express repeal of the supplement of 1857, exempting foreign stocks, when taxed abroad and the taxes paid, from taxation here.

The fourth point remaining is one of mere difficulty; but I

Newark City Bank v. The Assessor.

think the City Bank, upon a fair construction of the act, is exempt from taxation upon its state bonds and United States securities. The difficulty arises from the peculiar phraseology of the 8th section of the act, "that all private corporations of the state, &c., shall be and are hereby required to be respectively assessed and taxed at the full amount of their capital stock paid in and accumulated surplus; but any real estate which such corporations may lawfully own in any other state shall not be liable to be estimated in such accumulated surplus; and the persons holding the capital stock of such corporations shall not be assessed therefor."

If this could be regarded as a tax upon corporations, *as such*, and not upon their property, they could not claim exemption for non-taxable property held by them. Although the act might be oppressive, no reason is perceived for doubting its validity. It is competent for the legislature, independent of any contract between them and the state, to tax them at discretion. But I think the act cannot be so regarded. The 8th section expressly exempts from estimation, as a part of the surplus, real estate owned in another state, and the 13th section provides for the taxation of the real estate of private corporations in the ward or township where it is located, and directs the amount of the assessment to be deducted from the amount of the capital stock and surplus and funded debt, or of the valuable assets of the corporation. These provisions, in connection with the 8th section, show that the tax designed by the act was a tax upon *the property* of the corporation, not *its franchise*. The direction of the act is, in substance, that the amount of their personal estate, upon which the tax is to be laid, is to be conclusively ascertained by the amount of their capital paid in and accumulated surplus, deducting the value of their real estate owned in this state from the sum total, and their foreign real estate, when lawfully owned, from the surplus. The act was designed, doubtless, to cut off all other deductions, and to furnish a plain rule by which to assess their property, without inquiring into their investments.

Newark City Bank v. The Assessor.

If the provision is equivalent to one declaring, that from this amount no deduction shall be made for New Jersey state bonds or United States securities issued by the government under the power to borrow money, but that they shall be included in the amount at which they are to be taxed, it presents the question, can the legislature, consistently with the constitution of the United States, enact that corporations shall be taxed for the United States stocks and securities they hold? Nothing can be plainer than that it cannot. What it cannot do directly it cannot by mere circumlocution. A law taxing the aggregate, taxes all the parts of which it is composed, as effectually as if the parts were particularly mentioned. The act of congress exempts these securities, when held by corporations as well as by individuals, from taxation by state authority. If it were necessary, I should hold this section, so construed, so far void as in conflict with the constitution of the United States. This may be avoided by holding that all property held by them, by other acts (not capable of being repealed by this act) or by constitutional provisions exempt from taxation, are impliedly excepted, and to be deducted from the amount of the capital stock and surplus. The act is not to be interpreted so as to make it conflict with constitutional provisions where that can be avoided. As we have already seen, the whole series of acts on this subject are to be considered as one, and construed together. A cemetery company, although having a stock paid in, would, under the second subdivision of the fifth section of the act of 1854, be entitled to have its graveyard, not exceeding ten acres, exempt from taxation. So would a library company its library, an academy or seminary of learning its property, because the 5th section of the act of 1854 is unrepealed and in full force, as modified by the 17th section of the act of 1862. And yet, if we adhere to the strict words, "full amount of their capital stock and accumulated surplus," these exemptions cannot take effect.

The broad words of the 8th section are not to be understood without qualification by other parts of the act and the

Newark City Bank v. The Assessor.

other acts on the same subject. By parity of reasoning, all other property protected by constitutional provision is also to be excepted.

We ought not to assume that the legislature intended to lay a tax on property by the constitution and laws of the United States exempt from taxation, where the intent has not been declared in unequivocal language. That is not the case here.

The bank is entitled to a deduction for the stock issued by this state held by it, also for bonds and notes of the United States in its hands owned by it.

To recapitulate my conclusions :

1. The bonds issued by this state under the act of 1861 are exempt from taxation when held by individuals or corporations.

2. The stock and securities issued by the United States under the power to borrow money are exempt from taxation in the hands of individuals or corporations.

3. Stocks in foreign corporations, held by individuals resident in this state, are personal estate within this state, and subject to taxation.

4. Corporations are entitled to have deducted from the amount of their capital stock paid in and accumulated surplus, the amount of the bonds of this state and the stock and public securities issued by the United States owned by them at the time of assessment.

ELMER, J. The questions arising in these cases are—

First. Are the stocks and bonds of the United States taxable by this state?

As the act of congress declares, in express terms, that they shall not be taxed by a state, this is simply a question of constitutional power. Upon this question, we are bound by the decisions of the Supreme Court of the United States, which has held that the power “to borrow money on the credit of the United States” carries with it, by necessary

Newark City Bank v. The Assessor.

implication, the power to do so free from the control of the states. *Weston v. City of Charleston*, 2 *Peters* 249.

Whatever may be our individual opinions on the reasoning of the court on this and the preceding cases, this decision is the law of the Union, and however inconvenient such an exemption may prove, it is our duty to submit to the paramount power of congress over a subject belonging exclusively to the general government. It is true, as suggested by the attorney general, that a part of this tax is to be assessed and collected to enable the state to pay its quota of a direct tax of twenty millions of dollars, imposed by congress, and assumed by this state. The act of congress provides that any state or territory may lawfully assume, assess, collect, and pay into the treasury of the United States its quota, in its own way and manner, and through its own officers, and may use for this purpose the last, or any subsequent valuation list or appraisal made by state or territorial authority. The act exempting these stocks and bonds is subsequent in time to the direct tax law. But were it otherwise, I do not see how this tax law can affect the question. So far as it professes to confer any power on the legislature of this state, it is destitute of constitutional authority. The powers of the state legislature are derived directly from the people of the state, and not from an act of congress. It has not imposed this tax by virtue of the act, but by virtue of its general power of taxation. A part of the money raised has been paid into the treasury of the United States, for a purpose in which the people of this state have a deep interest; but it is not less a state tax for state purposes, and the sum paid into the treasury is so mingled with the sums raised for other purposes that they cannot be separated. In my opinion, the bonds and stocks of the United States are exempt from taxation by the state for any purpose.

Second. Are the bonds issued by this state taxable?

Upon this question there is no room for doubt; they are expressly exempted by the law of the state, and have this exemption printed on them. Even if issued since the tax

Newark City Bank v. The Assessor.

law was passed, they bear the pledge of the state that they shall not be taxed ; a pledge there is no reason to suppose the legislature meant to violate.

Third. Is a bank or other corporation, by the true construction of the eighth section of the recent tax law, entitled to have the amount of such bonds and stocks held by them deducted from the capital stock and accumulated surplus, so as to be taxed only on the balance ?

This question is far more difficult of solution than the others. The explicit words are, that private corporations, with certain exceptions, are required "to be respectively assessed and taxed at the full amount of the capital stock paid in and accumulated surplus." This would seem to mean that no inquiry is to be made as to how the capital paid in and the surplus may happen to be invested ; for it is beyond doubt that the state legislature has the constitutional power to tax corporations or classes of individuals, by an arbitrary rule in the nature of a poll tax, without regard to their property. The question is, whether the present law, fairly interpreted, shows such a purpose ? It is plain that, with the exception of the poll tax provided for in the sixth section, the act is framed upon the principle of assessing the tax required on real and personal estate. Such is the language of the seventh section ; and the thirteenth section provides that the real estate of corporations shall be assessed to said corporations where they are situate, and the amount of such assessment shall be deducted from the amount of the capital stock and surplus. We cannot presume that the legislature meant to disregard its own pledge, upon the faith of which these corporations have taken the state bonds, nor that they meant to violate an act of congress. It was urged, on behalf of the state, that these stocks and bonds are not in fact property, but only represent property loaned to and used by the government. The tax law, however, treats them as property, as it does other choses in action ; and those laws which in terms exempt them from taxation, do so on the supposition that they would be taxed, if taxed at all, as property.

Newark City Bank v. The Assessor.

To tax them therefore as property, in whosoever hands they may be, or by whatever device, is to disregard the exemption. This I cannot suppose the legislature meant to do; and if they did, it was beyond their power. Nor is it forgotten that it does not appear, and probably is not the fact, that the corporation prosecuting this *certiorari* has by any formal statement of its accounts, or in any way vested its capital and surplus specifically in the stocks and bonds. They are doubtless in the same situation as discounted bills or other loans made by it, which in the aggregate largely exceed the capital and surplus. But this cannot alter the real situation of the case. The debts due by the bank are entitled to be deducted from its assets, so far at least as loans in excess of the capital paid in are concerned; and this being done, it follows that the stock and bonds in question are in fact a part of the surplus capital. I think we cannot escape the conclusion that corporations are entitled to deduct from their capital and surplus the amount of United States and New Jersey bonds owned by them when the assessment is made.

Fourth. Are the stocks of corporations in another state taxable in this state?

It is insisted, for the prosecutor, that the seventh section of the act declares that all real and personal estate within this state, shall be liable to taxation, and that, as all inconsistent acts are repealed, no personal property but such as is actually within this state is now to be taxed. But the repealing clause, the 21st, in terms repeals the second and several other sections of the act of 1854, and does not repeal the others. Among those not repealed is the fourth section of that act, which declares that "the term personal estate, as used in this act, shall be construed to include goods, &c., public stocks, and stocks in corporations, whether within or without the state." And to make the legislative intention more plain, the act of 1857, which modified the fourth section of the act of 1854, is expressly repealed. This leaves no room for construction or doubt. When certain named sec-

State v. Babcock.

tions are declared to be repealed, it necessarily results that the others are meant to be left in force, and are thus in effect declared not to be inconsistent with the new act. The fourth section of the act of 1854 is thus made a part of the act of 1862, and explains and enlarges the meaning of the seventh section, just as originally it explained and enlarged the second section of the act of 1854, for which the seventh section of the act of 1862 is substituted, being slightly altered. I am therefore of opinion that the value of stocks in corporations of other states is to be added to other personal property, and taxed in the same manner.

VREDENBURGH, J., concurred, except as to the exemption of United States bonds and stocks. VAN DYKE, J., concurred, except as to taxation of stocks held in corporations in other states.

CITED in *Mechanics and Traders Bank v. Bridges*, *infra* 117; *State, Mutual Life and Casualty Co., pros., v. Haight, Collector*, 5 Vroom 130; *State, International and Life Assurance Co., pros., v. Haight, Collector*, 6 Vroom 280.

STATE v. BABCOCK AND BABCOCK.

1. An indictment will lie for a nuisance in obstructing Hudson river, by placing vessels and wrecks on the shore between the high and low water lines, but not for placing them below the low water line.
2. The exclusive jurisdiction in and over the waters of the Hudson, and in and over the land covered by those waters, is in the state of New York, and not in the state of New Jersey.

The indictment in this case was found in the Court of Oyer and Terminer of the county of Hudson, and removed by *certiorari* into the Supreme Court. It was taken down for trial before the Circuit Court of said county, and the jury returned a general verdict of guilty, together with a special state of the case.

Argued before the CHIEF JUSTICE and Justices HAINES, VAN DYKE, and ELMER.

For the State, *Isaac W. Scudder*.

For defendants, *S. B. Ransom*.

State v. Babcock.

The opinion of the court was delivered by

ELMER, J. By the compact between the states of New Jersey and New York, ratified by the legislatures of the two states, and approved by congress, *Nix. Dig.* 822,* the state of New York has exclusive jurisdiction of and over all the waters of Hudson river, and of and over the lands covered by the said waters, to the low water mark on the New Jersey shore; and the state of New Jersey has the exclusive right of property in and to the land under the water lying west of the middle of the river, and exclusive jurisdiction of and over the wharves, docks, and improvements made and to be made on the Jersey shore, and on vessels aground on said shore, or fastened to any such wharf or dock, except as to quarantine regulations and the exclusive right of regulating the fisheries on the westerly side of the middle of the river. The waters of the Hudson, although exclusively within the jurisdiction of New York, are a common highway for all the citizens of the United States. Any obstruction to that highway, placed on the shore above low water mark, which shore remains exclusively within the jurisdiction of New Jersey, either by means of vessels, logs, stones, or other temporary obstructions placed there, or by means of a wharf or other improvements which are injurious to the navigation, is of course indictable in this state; while obstructions below the low water mark where not only the water but the land under the water are exclusively, except as to the fisheries, within the jurisdiction of New York, can only be punished by proceedings in the courts of that state or of the United States. If by docks, as used in the compact, is meant, as I suppose according to the American usage, the spaces between the wharves, the land covered by the water within such docks is also within the jurisdiction of this state, and obstructions placed therein, which are injurious to the navigation, may be indicted in our courts.

The indictment in the case before us charges that the defendants obstructed the free navigation of the river, by placing, sinking, and lodging in said river, and upon the

* *Rev.* p. 1173.

State v. Babcock.

shore of this state in said river, certain ships, schooners, boats, and other vessels; and it is found as a fact by the jury, according to the special case returned to us with a general verdict of guilty, that the defendants had, within the time specified in the indictment, placed and procured to be placed vessels and wrecks of vessels, both above and below the low water line, which were an interruption to the free navigation of the river. Other facts are also found by the jury, which perhaps were meant to show that obstructions were placed in a dock; but the indictment does not charge that any obstructions were placed in a dock, nor do the facts stated enable us judicially to determine that such was the case. What is a dock, I suppose is a mixed question of fact and law.

Had the special case explicitly stated that the obstructions placed on the shore, that is on the land covered by the tide between the ordinary high and low water lines, were obstructions to the navigation of the river, and did it sufficiently appear that the two defendants had acted jointly in placing and keeping them there, I should be of opinion that judgment ought to be pronounced for the state. As the case appears, it will be the only safe course to send down the case for a new trial, that these two questions may be distinctly submitted to the jury.

It has been earnestly insisted that the safety of property holders on the Jersey shore requires us to hold that obstructions in the river, outside of the low water line, if injurious to the navigation of vessels coming to that shore, are offences against our laws and indictable in our courts. But apprehensions of this kind, which are probably altogether imaginary, will not justify us in departing from the plain meaning of the compact. Although, for some purposes, New Jersey is bounded by the middle of the Hudson river, and the state owns the land under the water to that extent, exclusive jurisdiction, not only over the water, but over the land to the low water line on the Jersey shore, is in plain and unmistakable language, granted to, or rather acknowl-

State v. Babcock.

edged to belong to the state of New York. There is no reason to doubt that the tribunals of that state, which have a common interest in preventing all obstructions to the navigation of the waters surrounding their most important city, will not only punish all crimes against our citizens or their own, while in or upon those waters, but will also adequately punish all interference with the navigation. The case does not materially differ from a line between two states on the land which happens to be the scene of a busy population, where a manufactory near to that line, in one state, may be a nuisance to the citizens of the other, whose redress will have to be obtained from the tribunals of the state in which the nuisance is situate.

As persons not acquainted with the circumstances of the dispute between the states of New Jersey and New York, in regard to their respective rights in the river and bay separating them, have sometimes complained of the compact agreed upon in the year 1833, after a long and troublesome controversy, and after the failure of two previous attempts to terminate it by agreement, as having conceded too much to New York, it may be proper to take this opportunity of explaining the obvious motives which induced the commissioners and the legislature of this state to consent to the terms finally adopted.

The territories now forming the states of New York and New Jersey, including by name Hudson river, were granted originally by king Charles the second to his brother, the Duke of York, afterwards James the second. The duke granted to Lord Berkeley and Sir George Carteret the territory now the state of New Jersey, and described it as "all that tract of land adjacent to New England, and being to the westward of Long Island and Manhattan Island, and bounded on the east part by the main sea and part by Hudson river, and bath upon the west Delaware bay or river." Between the date of this grant and the Revolution, the charters of New York city, and the proceedings of its authorities, showed that it had always been claimed that the whole

State v. Babcock.

of Hudson river, up to the low water mark on the westerly shore, belonged to that state. But it was only after the Revolution, and when it appeared that, if this claim was acquiesced in, all the wharves and improvements on the Jersey shore would be subject to the control of New York, that New Jersey claimed that, by conquest from the crown, the right of New Jersey was extended to the middle of the river. This led to the appointment of commissioners by the two states to settle the conflicting claims in 1807, and again in 1827, without success.

In the meantime, Judge Washington had decided that the grant to New Jersey limited its territory to the eastern shore of the Delaware river and bay, a decision acknowledged by this court to be correct. *State v. Davis*, 1 *Dutcher* 386. And, which was still more adverse to the claim of this state in reference to the waters of the Hudson, the Supreme Court of the United States laid down the doctrine, that "when a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only;" and upon this principle they held that the Ohio river was exclusively within the territorial limits of Kentucky, and that Indiana had no jurisdiction over or right to the river. *Handley's Lessee v. Anthony*, 5 *Wheat*. 374.

When the commissioners of New Jersey and New York again met, in 1833, and it was found that those of the latter state appeared to be desirous of arranging the dispute upon fair and liberal terms, but deemed it indispensable that their great commercial emporium should have the exclusive control of the police on the surrounding waters, and full power to establish such quarantine regulations as should be found necessary, the commissioners of this state deemed it wise to secure the exclusive property in the soil to the middle of the

State v. Babcock.

river, and exclusive jurisdiction over the wharves, docks, and other improvements made or to be made on the Jersey shore, and of the vessels fastened thereto, and the right to regulate the adjacent fisheries, leaving to New York, which was thought to be quite as much a burthen as a privilege, the exclusive jurisdiction over the offences in or upon the waters or the land covered by the water outside of the low water mark. As it was thought possible that the time might come when Perth Amboy should be an important city, like exclusive jurisdiction over the adjacent waters to low water mark on Staten Island was secured to this state. Nothing has since occurred to make the propriety of this arrangement doubtful; on the contrary, there is every reason to believe that it has secured important rights to this state, which otherwise might have been lost.

In further elucidation of this subject, it is to be noticed that the river Delaware was never within the jurisdiction either of this state or Pennsylvania until, by the Revolution, the rights of the crown were extinguished, and each state then held to the middle. Under these circumstances, the agreement between the two states, adopted in 1783, *Nix. Dig.* 824,* provided that the two states should have concurrent jurisdiction in and upon the water of that river. Of so little importance, however, was this regulation, that it was not until so lately as 1856,† that any law of this state was passed providing for the punishment of offences committed on the river.

A new trial ordered.

*Rev., p. 1181. †P. L., 1856, p. 242.

Ortley v. Chadwick.

ACHSA E. ORTLEY v. SAMUEL L. CHADWICK.

1. A paper may be competent evidence of a fact stated in it, although invalid as an agreement to bind the party.
 2. The statements of an agreement invalid for want of consideration may be competent, and may be proved by the paper.
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In ejectment. Case certified from Ocean Circuit Court.

For the plaintiff, *J. D. Bedle*.

For the defendant, *A. C. McLean*.

CHIEF JUSTICE. This was an action of ejectment for 27.45 acres of land, which was once the bed of Cranberry inlet, in the county of Monmouth.

The plaintiff claimed the land under a patent from the board of proprietors to Thomas Gordon, dated April 1st, 1703, which it was insisted covered the premises in dispute.

The defendant claimed that, when the Gordon patent was issued, Cranberry inlet covered the premises in dispute; that it being land in the bed of this arm of the sea, it was not within the patent, and did not pass by its terms.

The description in the patent was as follows: also another tract on Barnegat beach, beginning at Margaret Winder's land, which is forty chains below the mouth of Vale creek, and running southwest along the beach to the new inlet in length, and from the sea to the beach.

The defendant's title was founded upon a survey and return of the lands, made in 1837, to Edward Brinley, who conveyed it to defendant.

The principal controversy at the trial was, whether this land was covered with water at the date of the Gordon patent.

The evidence on the part of the plaintiff tended to show that the inlet broke through after the Gordon patent was issued, remained open until 1816, and then closed. The de-

Ortley v. Chadwick.

defendant's evidence, that it was open in April, 1703, the date of the patent. The real question in the cause was, whether the new inlet mentioned in the Gordon patent was below Cranberry inlet, or was Cranberry inlet.

The plaintiff insisted it was below it, and not it, and endeavored to prove it.

On his principal case the plaintiff offered in evidence, not as a part of his title, for he did not claim under it, a deed from Andrew Bell and F. W. Brinley to Michael L. Ortley, dated August 22d, 1857, to fix the beginning corner of the defendant's survey. This was a deed for 123.40 acres.

After the defendant had given his documentary evidence, he was sworn, and stated, that Ortley told him, shortly after he took up this land, that the reason he did not take it all up across the beach was because it was too sandy; he did not want to pay tax for it.

This testimony was offered in relation to this 123 acre tract, conveyed by Bell and Brinley to Ortley in 1857, to show that Ortley admitted that the land was then vacant, and gave as a reason for not taking it up, not that it was a part of the old beach covered by the Gordon patent, but that it was too sandy. In order to parry the force of this evidence, the plaintiff, on his rebutting case, endeavored to show that such was not the reason why it was not included in the 123 acre survey, but that the true reason was that the surveyor who made the survey, under an agreement between Bell and Brinley and Ortley, did not then think it new land, but a part of the old Gordon patent. The plaintiff here offered in evidence an agreement between Andrew Bell and Francis W. Brinley, a committee of the board of proprietors, and Ortley, by which they agreed to convey to Ortley all the vacant meadow and sedge islands now lying opposite to and adjoining the part of the beach now owned by Ortley in Barnegat bay, in the county of Monmouth, the survey thereof to be made by Ananias Gifford.

To the reception of this paper in evidence, the defendant made two objections.

Ortley v. Chadwick.

1st. That it was not the best evidence ; that the minutes of the board should have been offered to show the authority of Bell and Brinley to make it.

2d. That it was not rebutting evidence.

The judge admitted it, suspended judgment on the verdict, and certified to this court the following question for its advisory opinion, whether the agreement was legal evidence at all, and when offered. The only objection made to the authenticity of the agreement was not that it was not proved by the subscribing witness, but that the minutes of the board should have been produced to show the authority of Bell and Brinley. Judge Gifford, who was named in it, said he was present with Ortley before the board when the agreement was made ; that it was signed before the board, and in their presence. He also testified that he made the survey in conformity to the agreement, and did not include the tract in dispute, because it was not vacant land, but included in the Gordon patent.

The Bell and Brinley deed, offered in evidence before this by both parties, showed that this agreement had been carried into effect by both parties, and the land included in it conveyed to Ortley, on the 22d August, 1857, by Bell and Brinley, to whom it was returned.

It was entirely immaterial whether the agreement was binding upon the board or not. It was not offered as evidence of title, but of intention to show that Ortley intended to buy and have surveyed *all* the vacant land, and not a part of it, to rebut the evidence of Chadwick, that he did not have the whole vacant land surveyed, because it was too sandy. The argument from the agreement was, that Ortley could not have said so, because he had bargained for the whole, had expressed his intention to have the whole, and bound himself to take the whole, and that, in consequence, Gifford surveyed the whole. Taken in connection with the deed of Bell and Brinley, which was in execution of it, it showed that they intended to sell the whole vacant land, which the declaration of Ortley tended to disprove.

Ortley v. Chadwick.

The fact of its execution by them, as a committee of the board, not being denied, and it having been carried into execution by a subsequent return and conveyance, and Gifford having made the survey, as he swears, to carry it into execution, it was competent without any proof to show that it was binding on the board when made.

A paper may be competent evidence of a fact stated in it, although invalid as an agreement to bind the party.

The statements of an agreement, invalid for want of a consideration, may be competent, and may be proved by the paper.

The statement of Ortley was, that he did not buy all the vacant land. His previous acts, thus proved, showed he did.

The paper was a component part of Ortley's act of purchase. It was competent for him to show that he did buy all the vacant land, had it surveyed and conveyed to him.

Gifford testified he surveyed all the vacant land, to carry into effect that paper. It was competent, whether valid as an agreement or not, to explain and corroborate the evidence of Gifford.

The paper was legal evidence in the cause, and was properly admitted as rebutting evidence. It legally tended to destroy the effect of the plaintiff's admission, by showing either that it was never made, or, if made, that it was not intended as an admission that the land was vacant.

ELMER, J. The question certified to this court for its advisory opinion is, whether a certain agreement, signed by Andrew Bell and Francis W. Brinley, dated May 16th, 1837, "was legal evidence at all, and when offered." Instead of explicitly stating under what circumstances and for what purpose the paper was offered, as it is very desirable such cases should do, this case leaves us to infer this from a mass of testimony and a mere reference to documents, most of which have no relation to the point submitted. It appears that the plaintiff claimed title to a tract of land on the sea shore, in the possession of the defendant, under a survey

Ortley v. Chadwick.

made in 1703, called the Gordon survey. The defendant claimed the premises by virtue of a survey of twenty-seven acres, recorded in 1859, for Edward Brinley. The title of the respective parties turned on the question, whether the boundaries of the Gordon survey included the land surveyed to Brinley. It is described very vaguely as "beginning at Margaret Winder's land, which is forty chains below the mouth of Vale creek, and running southwest along the beach and the new inlet in length, from the sea to the beach in breadth." The main point of dispute seems to have been the situation, at that time, of the "new inlet." After the plaintiff had put in evidence sundry documents and much verbal testimony tending to show the change of the inlet and other circumstances, and had rested his case, the defendant produced evidence tending to show that what has in modern times been called Cranberry inlet, was there at the date of the Gordon survey. He also gave in evidence a survey to Bell and Brinley, dated in 1837, for 123 acres, which he insisted tended to show this, and otherwise to aid in fixing the true location of the Gordon survey; and for the same objects the defendant himself testified that Michael Ortley, under whom the plaintiff claimed, told him, a little while after he took up the 123 acres, that the reason he did not take it all up across the beach was because it was too sandy; he did not want to pay tax for it. By taking it up across the beach he would have taken up the disputed land, or some part of it, and the inference from this declaration was, or might be, that he did not claim it under the Gordon title. After the defendant had rested, the plaintiff produced the agreement in question, which had been previously stated by a witness to be the same by virtue of which the survey of 123 acres was made.

It was urged, for the defendant, that this agreement was inadmissible, because the minutes of the council, whereby Bell and Brinley were authorized to act as its committee, was the only competent evidence of its proceedings; and it was also insisted that the agreement, if admissible at all, should have been produced as original evidence of the

Ortley v. Chadwick.

plaintiff's title before he rested his case. These objections seem to rest on the assumption that the agreement which was signed by Bell was offered to show that, at the date thereof, the proprietors supposed and admitted that the Gordon survey covered the land now in dispute. I find nothing in the case to show for what purpose it was offered; but if it be taken for granted that this was the object, I do not perceive that the minute of the council was of any importance. The council of proprietors is not the owner of the land, and conveyed no title to it. Its duty is to examine the title of individual claimants to undivided rights, and if found to be regular, to authorize and approve setting off to them in severalty, by proper surveys, their due quantity of acres out of any land not before appropriated and set off to some other proprietor. If the acts or admissions of Bell and Brinley, or of any other proprietors, were competent evidence, as against the defendant, to show that before the making of his survey they believed the land was included within a prior survey, which it is not necessary to decide, it was, as the acts and admissions of individual proprietors, made in opposition to their interest, which were as properly proved by the agreement itself as by the most formal act of the council.

But there is another purpose for which, it appears by the case, this paper might have been properly offered when it was received, and for which purpose we must presume it was offered, and that was to explain and rebut the evidence produced by the defendant. It was a document connected with the survey of 123 acres produced by him, and by virtue of which there was evidence that survey was made. It was therefore of itself, and whether authorized in fact by the council or not, competent to explain the circumstances under which that survey was made. It was also competent to go to the jury, as tending to show that the defendant may have mistaken or misrepresented what Ortley said about it. What effect it was entitled to have was a question for the court and jury, which we must presume they decided cor-

Howland v. Adrain.

rectly. I am therefore of opinion that it be certified to the Circuit Court that the agreement was legal evidence when it was offered.

ROBERT HOWLAND v. ROBERT ADRAIN.

1. A notice of protest should sufficiently describe a note to apprise the party to whom the notice is sent what note is meant. If he is not misled by it, but understands what note is referred to, it is sufficient. Although it may not give all the essential parts of the note, or may describe it in some respects inaccurately, the description must be so full and true as to identify it. To render a variance fatal, it must be such that, under the circumstances of the case, the notice conveys to the endorser no sufficient knowledge of the note which has been dishonored. No precise form of words is necessary in such a notice, but the language must be such as to convey notice of what the bill or note is, and that payment of it has been refused.
 2. Each party has a day for giving notice, that is the whole day on which he receives notice, to prepare his notice to the party liable to him. He must put it in the office in time to go by the mail of the next day closing after business hours commenced, if there be such mail. The party sending the notice must mail it on the next day after he receives it, although the party from whom he has received notice has not taken all the time the law allowed him for giving the notice. He cannot avail himself of the extra diligence of subsequent endorsers as an excuse for his own delay.
 3. What is reasonable diligence in endeavoring to ascertain the residence of the endorser must depend upon the circumstances of each case. What would be sufficient in one case, would fall far short in another.
 4. If the notice is sent by the mail of the next day after ascertaining the residence, when due diligence has been used, that will be sufficient.
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In case. Case certified from the Middlesex Circuit. The facts appear sufficiently in the opinion of the court.

Argued at February term, 1862, before WHELPLEY, Chief Justice, and Justices ELMER and VAN DYKE.

Howland v. Adrain.

For the plaintiff, *J. P. Bradley.*

For the defendant, *Robert Adrain.*

CHIEF JUSTICE. This is an action against the defendant, as endorser of a promissory note, made by S. B. Driggs, payable to the order of the defendant, for \$500, due on the 4th September, 1860, and endorsed by defendant for the accommodation of Driggs. The note was deposited by the plaintiff, through his attorney in fact, F. H. Wolcott, in the Bank of New York for collection. Driggs, the maker, had a place of business in New York, where, when the note became due, demand of payment was made by the notary of the bank, the holders thereof. The case is before us, on the certificate of the judge who tried the cause, upon the point, whether notice of nonpayment was given, as required by law.

The note bears date in New York. The defendant, when the note was made and became due, resided in New Brunswick, in this state.

Two points were made on the argument by the defendant.

1st. That there was no notice of nonpayment given to him in time.

2d. That the notice relied upon, if in time, was not sufficient. Wolcott, the attorney of the plaintiff, who was the next endorser after the defendant, had a place of business in New York, but resided at Newtown, Long Island. The notary made no inquiry for Adrain, but not finding his name in the directory, mailed the notice for Adrain in an envelope addressed to Robt. Howland, care of F. H. Wolcott, 88 Wall street, New York, and it was put in the mail on the morning of the 5th of September. This was received by Mr. Wolcott, at Newtown, on the evening of the same day. On the morning of the same day, he called at the Bank of New York, and was there informed that the note had been protested, and took the note and left it with his attorney, Mr. Jackson, with instructions to commence proceedings immediately. He made no inquiry for the residence of Adrain.

Howland v. Adrain.

He says Driggs did inform him that defendant was a lawyer, and resided in New Jersey, but does not recollect that he gave him his post-office address. On the 6th, he left the notice he received at Newtown on the table of Mr. Jackson, but did not see him.

Mr. Jackson says, that on the 5th, he prepared a summons and complaint to serve on Adrain in New York, but could not find his name in any of the directories he consulted; that he made no inquiries on the 5th for Adrain, but on the morning of the 6th, it occurred to him that the defendant might reside in New Jersey; that he then went to the office of the New Jersey Railroad Company, in the Exchange, and inquired for him, but got no information; that he then went to the law office of Hardenburgh & Rutgers, who were residents of New Jersey, but they were not found, and about four o'clock he went to Driggs' office, and thus, about half past four or five o'clock, learned that the defendant resided in New Brunswick.

At half past nine, on the morning of the seventh, he mailed the following letter to the defendant in time for the mail that went at four o'clock P. M.

“48 WALL STREET, NEW YORK CITY,
Sept. 7, 1860.

Robert Adrain, esq.

Dear sir,—Day before yesterday, F. H. Wolcott, esq., the attorney of R. S. Howland, esq., placed in my hands a note for collection, the note being for \$500, and payable to your order September 1, 1860. That note has been protested at the Bank of New York, and notice thereof sent, of course, to you and to Mr. Howland. As I am instructed to collect the amount at once, I write to inquire if you are disposed to pay the note, with the usual costs of protesting and collection, together with interest, and thus render any further proceeding unnecessary, &c., &c.

(Signed)

JOS. C. JACKSON,
Att'y of Robt. Howland.”

Howland v. Adrain.

In his reply, dated the 8th, to this letter of Mr. Jackson, the defendant says: I certainly presumed that the note referred to had been paid, as I had no notice of protest, nor was any sent to me at this place. Mr. Driggs is absent for a day or two, &c., &c., &c.

A notice should sufficiently describe a note, to apprise the party to whom it is sent what note is meant. If he is not misled by it, but understands what note is referred to, it is sufficient. Although it may not give all the essential parts of the note, or may describe it in some respects inaccurately, the description must be so full and true as to identify it.

To render a variance fatal, it must be such that, under the circumstances of the case, the notice conveys to the endorser no sufficient knowledge of the note which has been dishonored. No precise form of words is necessary in such a notice, but the language must be such as to convey notice of what the bill or note is, and that payment of it has been refused. *Hartley v. Case*, 4 B. & C. 339; *Reeddy v. Seixas*, 2 Johns. Ca. 337; *Mills v. Bank U. S.*, 11 Wheat. 431; *Cayuga Bank v. Worden*, 1 Comstock 417.

Extraneous circumstances may be shown to prove that the notice could not have misled the endorser, as that there was but one note of that date of that amount. Any evidence showing that the endorser was in fact notified of the dishonor of that note is admissible. *McKnight v. Lewis*, 5 Barb. 681; *Cayuga Bank v. Worden*, 2 Selden 19.

It is manifest that the defendant was not misled by the letter of Jackson; it is not pretended that there was any other note of that description upon which he was endorser, save that of which Driggs was the maker. *Kilgore v. Bulkley*, 14 Conn. 362.

If the notice did its office, it was surely sufficient.

The sufficiency of the notice is to be decided by the laws of New York. *Aymar v. Sheldon*, 12 Wend. 439; *Carroll v. Upton*, 3 Comstock 272; *S. C.*, 2 Sand. Sup. Ct. 172.

The two most recent cases in New York are *The Home Insurance Company v. Green*, 19 N. Y., 5 Smith 519, and

Howland v. Adrain.

Hodges v. Shuler, 22 *New York*, 8 *Smith* 118. In the former case, the notice omitted the name of the maker of the note, but was correct in other respects. It was shown that, about the time of delivering the notice to the defendant, the same notary served a number of other notices of protest upon him. There was no evidence to show whether the defendant had been misled or not. The Court of Appeals held the notice insufficient.

In *Hodges v. Shuler*, the same court held a notice good, although it did not truly give the name of the maker, describing him as S. Henshaw, treasurer, without stating of what company, the note being that of the company. The court held it good because the defendant was contractor with the company, and the note had been given to him in payment by the company, and he must therefore have known who the maker was; in fact the extraneous evidence clearly showed that the defendant had not been misled by the defective notice, and that evidence for this purpose was admissible.

This case is distinguishable from that of *The Home Insurance Company v. Green*, on the ground that the proof showed that defendant knew what note was intended with reasonable certainty. Indeed that case seems hardly reconcilable with the current of authorities, or even with the cases cited by the court in its support. Perhaps it may be supported upon the ground that a mistake in the name, or the omission of it altogether, should be held fatal, inasmuch as the object of the notice is to enable the endorser to look after the maker immediately and secure himself.

It has always been held that it is for the defendant to show the existence of other notes to which the notice might apply. 7 *Mees. & Wels.* 436; *S. C.*, 8 *Ib.* 252; *Stockman v. Parr*, 11 *Mees. & Wels.* 810; and all the cases proceed upon the ground that the notice is given to one who either has, or ought to have a knowledge of the notes he has endorsed. The court, in the case in 5 *Smith*, puts itself upon the ground that the notice is to be full, so as to aid a defec-

Howland v. Adrain.

tive memory. In that respect I think it a departure from the rule established in other cases, and ought not to be followed.

The remaining question is, was the notice sent in time? The Bank of New York was the holder of the note, and through its notary gave notice to the plaintiff on the 5th September, by whom it was received on the same day; in addition he had notice early on the morning of the same day from the bank, and took the note into his custody. The bank, for the purpose of giving notice, is to be considered a distinct holder, although it held the note only for collection, and has a day to give notice to its customer. *Robson v. Bennett*, 2 *Taunton* 388; *Langdale v. Trimmer*, 15 *East* 291; *Howard v. Ives*, 1 *Hill* 263; *Bank of U. S. v. Davis*, 2 *Hill* 451; *Haynes v. Birks*, 3 *Bos. & Pul.* 599; *Story on Prom. Notes*, § 326.

Each party has a day for giving notice, that is the whole day on which he receives notice, to prepare his notice to the party liable to him. He must put it in the office in time to go by the mail of the next day closing after business hours commence, if there be such mail. *Howard v. Ives*, 1 *Hill* 263; *Story on Prom. Notes*, § 327; *Sussex Bank v. Baldwin*, 2 *Harr.* 487; *Burgess v. Vreeland*, 4 *Zab.* 71; *Edwards on Bills* 617, and cases there cited, note 4.

The party sending the notice must mail it on the next day after he receives it, although the party from whom he has received notice has not taken all the time the law allowed him for giving the notice. He cannot avail himself of the extra diligence of subsequent endorsers as an excuse for his own delay. *Turner v. Leech*, 4 *B. & Ald.* 451; *Harrison v. Ruscoe*, 15 *Mess. & Wels.* 251; *Story on Prom. Notes*, § 332.

As has already been stated, both the bank and the plaintiff had notice at an early hour on the 5th September, and the plaintiff, on the morning of the 5th, left the note with his attorney to be proceeded on. Neither the plaintiff's agent, Wolcott, or the attorney made any inquiry to ascertain the residence of the defendant on the 5th, although it must

Howland v. Adrain.

have been known to Wolcott that the drawer had a place of business in the city, where the inquiry could have been made with every probability of success. Wolcott knew that the note was endorsed by defendant for the accommodation of Driggs, and had been told by him that he resided in New Jersey. He gave no such information to the attorney, but suffered him to grope his way in the dark, when he might have enlightened him in a moment. The attorney spent the 5th September in drawing papers for a suit against defendant in New York, when Wolcott well knew he resided in New Jersey. No inquiry was made on that day. On the 6th, the attorney began his inquiries, it occurring to him that he might live in this state; but he made no inquiry of the maker, or at his place of business, until late in the afternoon of that day, when he immediately got the information, and sent his letter in time for the mail of the next day, the 8th September.

Wolcott, the holder of the note, who had control of it, and Jackson, his attorney, were guilty of *laches*: neither of them used due diligence to ascertain the residence of the defendant. It is perfectly evident that if they had done what they ought to have done—availed themselves of the means in their reach—they would have discovered the residence of defendant on the 5th September, so as to send notice to him on the 6th.

What is reasonable diligence in endeavoring to ascertain the residence of the endorser, must depend upon the circumstances of each case. What would be sufficient in one, would fall far short in another. *Story on Prom. Notes*, § 335.

If the notice is sent by the mail of the next day after ascertaining the residence, when due diligence has been used, that will be sufficient.

In *Rawdon v. Redfield*, 2 Sand. Sup. Ct. Rep. 178, Casey, Chief Justice, states the rule to be, “that if the notary inquire of persons who, from their connection with the transaction are likely to know the residence of the endorser, and are not interested to mislead the notary, and he acts on

Howland v. Adrain.

information thus obtained, it is due diligence on his part. Where the inquiry cannot be made of any of the parties, the notary should go among the business men of the place, and make a thorough inquiry at places of public resort, and among such persons as would be likely to know the residence of the endorser." *Spencer v. Bank of Salina*, 3 *Hill* 520.

The party should seek the best information in his power, and not resort to inferior sources before exhausting the superior.

The letter of Jackson was never intended as a notice of protest—that is apparent from its tenor. It states that a notice of protest had been sent to him: it was a mere dun letter, but nevertheless, if it was sufficient as such, and in due time, that can make no difference. This fact is noticed as accounting for the evident want of diligence of Jackson, the attorney—he only desired to apprise defendant that the note must be paid, or he would be sued.

I think that, owing to want of diligence in ascertaining the residence of defendant, the notice was one day too late. It should have been mailed on the 6th September.

There can be no doubt that the demand of payment was properly made.

The court had a right to infer, from the evidence, that the letter was put in the post-office on the 7th. Whether it was put in the mail on the 7th or 8th can make no difference—that was no fault of the holder. *Story on Prom. Notes*, § 328.

The postmark is at best but *prima facie* evidence that it was not put in the mail bag until the 8th, not that it was not put in the office until that day.

Circuit Court advised to give judgment for the defendant.

ELMER, J. The defendant, who resides at New Brunswick, in this state, was sued as the endorser of a promissory note for \$500, drawn by S. B. Driggs, dated at New York, payable September 1st, 1860. The note was

Howland v. Adrain.

placed, by the agent of the plaintiff, in the Bank of New York for collection. Not being paid at maturity, the notary demanded payment at the office of the maker, on the 4th of September, but not finding the endorser's name in the directory, made no inquiry for him; but on the 5th, put notices of protest for the plaintiff and defendant into the post-office, directed to the plaintiff's agent, who received them the same day. The agent, happening to call at the bank on the 5th, was informed of the protest, and took the note and protest to Mr. Jackson, his attorney, with directions to collect it. The notary's notice to the defendant was not left with the attorney until the 6th, and was not sent to the defendant until the 10th or 11th. The plaintiff's agent testified that he did not know the defendant's address, but he had been informed, by Mr. Driggs, that he was a lawyer, and resided in New Jersey. This information, however, was not communicated to Mr. Jackson, who stated that he did not know the residence of the defendant; but supposing him to reside in New York, prepared a summons, which, in consequence of his name not being found in the directory, was not used. On the 6th it occurred to him that he might reside in New Jersey, and on the morning of that day he made some inquiries without success, and about four o'clock of that day he went to the office of Driggs, and was there informed of the proper address. No notice, however was sent on that day, the mail for New Brunswick closing at half-past four in the afternoon, and also at five in the morning. On the 7th, Mr. Jackson addressed a letter to the defendant, which he says he put in the mail on that day about half-past nine o'clock. Upon being produced, the letter bears the postmark of the 8th, and it is testified by the defendant that he did not receive it until the 8th. The postmaster of New Brunswick also stated circumstances tending to show it was not mailed until the 8th. But the judge, who by consent tried the cause without a jury, found, as matter of fact, that the letter was mailed on the 7th, about nine and a half o'clock A. M., in time for the afternoon mail, and I am opinion that there is nothing in

Howland v. Adrain.

the case which will justify us in holding that this finding ought to be set aside as contrary to the evidence.

The letter sent states that he had received for collection a note for \$500, payable to defendant's order September 1st, 1860, which had been protested, and notice sent to defendant, and inquiring if he would pay the amount, with the costs of protest and interest, and thus render further proceedings unnecessary. To this the defendant immediately answered, saying: "I certainly presumed that the note referred to had been paid, as I received no notice of protest, nor was any sent to me at this place. Mr. Driggs is absent for a day or two; as soon as he returns I will at once give you the answer requested." The defendant testified, "when I received the notice, I supposed that the note referred to was the note of Mr. Driggs now in suit, but was not certain of it. I now know that there was no other note of his for \$500 which fell due at that time, but I did not know so then."

Two questions were discussed upon the argument upon which it is proper to express our opinion. First, was the notice mailed by Mr. Jackson, on the 7th, in time? The holder of the note, through his agent, having received notice of the protest on the 5th, was bound to send notice thereof to the defendant by the mail which closed after the commencement of business hours on the next day. Being ignorant of the defendant's address, that fact will excuse delay so long as that ignorance continues without his neglecting to use the ordinary means for acquiring information. *Woodruff v. Daggett*, *Spencer* 526; *Byles on Bills*, by *Sharswood*, 345, and cases cited. The maker of the note, it appears, had an office in the city, where, during his temporary absence, it was duly presented by the notary, and which Mr. Jackson could have easily found during the business hours of the 5th, and which he no doubt would have found had he been aware that notice of protest had not been forwarded to the defendant. To this place he went, after it was too late to send the notice by the mail of the 6th, and here he was

Howland v. Adrain.

at once informed of the defendant's address. It was the natural and proper place at which inquiry should have been at once made. To sanction the neglect to do this would be equivalent to holding that no diligence at all was necessary. The plaintiff's agent had been informed that his residence was in New Jersey; and had this information been communicated to Mr. Jackson, he would have known at once that something more was necessary than to look into the directory. I am therefore of opinion that notice was not sent in due time, and that it must be certified to the Circuit Court that notice of the nonpayment of the note was not given to the endorser, as required by law, to charge him with the payment.

The other question discussed was, whether, supposing the notice to have been sent in due time, was it sufficient?

At one time the English courts seemed disposed to hold that a notice must be sufficient to inform the party, either in express terms or by necessary implication, that the bill or note had been dishonored, and that he was looked to for payment. *Hartley v. Case*, 4 B. & C. 339; *Solarte v. Palmer*, 7 Bing. 530; 1 Bing. N. C. 194. And had Mr. Jackson's letter stood alone, without other evidence it would have been insufficient. *Home Ins. Co. v. Green*, 19 N. Y. (5 Smith) 519. But it seems now to be the decided weight of authority, both in England and America, and I think it is the true principle, that as the notice may be verbal or written, and no particular form is necessary, if it appears to the satisfaction of the court and jury that the party to be charged was in fact apprized by the notice of the dishonor of the note in question, and that he was expected to pay it, the notice will be sufficient, and an omission or misdescription which did not mislead him will be immaterial. *Burgess v. Vreeland*, 4 Zab. 71; *Mills v. Bank of U. S.*, 1 Wheat. 425; *Rochester Bank v. Gould*, 9 Wend. 279; *Beals v. Peck*, 12 Barb. 250; *Youngs v. Lee*, 2 Kern. 554; *Cayuga Bank v. Worden*, 2 Seld. 26; *Snow v. Curtis*, 2 Mich. 238; *Stratton v. Breath*,

Howland v. Adrain.

7 *Mees. & Wels.* 436 ; *Smith v. Boulton*, 1 *Hart & Walm.* 3 ; *Mellersh v. Rippen*, 11 *Eng. L. and E. R.* 599.

Had the notice stated who was the maker of the note, it would have been good of itself. The letter written by the defendant, on receiving it, shows that he knew this. He had endorsed no other note of that amount and date for Driggs or any other person. Upon the whole case, I think the court sitting for the jury would have been warranted in holding that the defendant was in fact apprized of the dishonor of the note in question, and was not misled by the omission to state the maker's name. It is true, as argued by the defendant, that proof of his being fully aware that this note was not paid, and had been protested, would not have been sufficient to charge him. He is entitled to express notice of this fact, and that he is looked to for payment, and this notice must come from some one interested in the note. But this is because, without such a notice, he has a right to infer that the holder is content to hold the maker, without having recourse to a mere surety. If he receives a notice in due time that a note he has endorsed is protested, he is at once put on his guard, and if reasonable means of knowing what note it is are afforded him, can at once take whatever steps he deems necessary for his own indemnity. It might have been better, perhaps, to have required a precise written notice, accurately describing the note, and expressly informing the endorser that he was looked to ; but mercantile usage, by which the courts have been guided, has not exacted this strictness, and it is too late now to require more than sufficient reasonably to notify him that he must take care of himself.

The Circuit Court is advised to give judgment for the defendant.

CITED in *Haines v. Dubois*, *infra* 261.

Town of Lambertville v. Clevinger.

THE INHABITANTS OF THE TOWN OF LAMBERTVILLE v.
ISAAC W. CLEVINGER.

1. The first section of the act of March 17th, 1858, in regard to damages to property in cases of the alteration of the grades of streets or highways (*Nix. Dig.* 752), applies to the alteration of a grade not before formally established.
2. The charter of Lambertville provides that the common council shall not alter the grade of any street which has been built upon and which has been fixed by lawful authority, unless by the consent of the owners of a majority of the lots, &c.; *held*, that this provision applies only to the altering of a grade previously fixed by lawful authority.
3. In such action the defendants not permitted to deduct from the amount of damages sustained by the plaintiff the amount of benefits derived by him from the improvement of the street. The land owner is entitled to the benefit which he derives, in common with other property holders on the street, by the making of the improvement, and the benefit he receives in common with others cannot be deducted from his damages.

In error to Hunterdon Circuit Court.

For the plaintiff in error, *C. A. Skillman*.

For the defendant, *B. Van Syckel*.

The opinion of the court was delivered by

ELMER, J. I am satisfied that the charge of the court, in all the points excepted to, was correct, and that the judgment must be affirmed. The action was founded on the act approved March 17th, 1858, (*Nix. Dig.* 752)* the first section of which provides, that an action upon the case shall lie in behalf of any person owning any house or other building standing and erected upon any street or highway, the grade whereof shall be or shall have been altered by virtue of the ordinance, resolution, or other proceeding of the legislative authority of any city, borough, or town corporate to recover all damages which such owner shall suffer by reason of the altering any such grade. It appeared that the street upon which the plaintiff's house was erected had, before the

* *Rev.*, p. 1009, § 70.

Town of Lambertville v. Clevinger.

alteration thereof complained of, been duly laid out, and had been for some years opened, and that no grade for the said street had been fixed by lawful authority, nor had the road been before worked upon by the authorities of the town. The working which occasioned the damage to the plaintiff's house, for which the action was brought, was done by virtue of a resolution of the town authorities, and consisted in filling up the street opposite the house. It was insisted for the town, before the Circuit Court and upon the argument here, that altering the grade of a street, as used in the act of 1858, means altering a grade which has been before formally established. In common usage the grade of a street is its line of ascent or descent, and this may be changed at any time, and in practice is changed by those charged with the duty of repairing the streets. In regularly incorporated cities and towns, grades are frequently established by ordinances or other regulations; but in the case of highways in the county, the grade is no otherwise established than by the actual work on the ground. The object of the act was, in accordance with the settled policy of our laws, to compensate the owners of property for injuries occasioned by acts of the public authorities for the benefit of others. It is a remedial act, and ought to be interpreted liberally rather than strictly. I am therefore of opinion that there was no error in charging that the grade of the street upon which the plaintiff's house stood had been altered by changing its level, within the true meaning of the law. The third section of the act in question provides that it shall not refer to any city or town whose charter provides for assessing and paying compensation to persons injured by the making of grades established or to be established. By the supplement to the charter of Lambertville, it is provided that the common council shall not alter the grade of any street which has been built upon, and which has been fixed by lawful authority, unless by the consent of the owners of a majority of the lots, nor without paying to the owners of buildings the damages to be awarded in a manner prescribed. This, it

Town of Lambertville v. Clevinger.

was insisted, brought the case within the third section, but the court charged that it did not, and I think correctly. The charter plainly provides for the case of altering a grade previously fixed by lawful authority, and only for such a case. It does not reach the plaintiff's case. The alteration which injured him was not pretended to be made under the provisions of the charter; but for the reason that no grade had been previously fixed, it was assumed that the town might change the level of the street at the pleasure of the authorities without compensation to any property owner, no matter how great might be the injury done him.

Exception was also made to that part of the charge which directed the jury that, in estimating the damages, they have a right to look at the expense of raising the house in question, and that the defendants were not entitled to prove that the property was worth as much after as before the filling up of the street, taking into consideration the general benefit derived by all from the improvement; that the plaintiff was entitled to the benefit which he derived, in common with other property holders in that street, by the making of the improvement, and that the benefit he received in common with others cannot be deducted from his damages. This, however, was in accordance with the ruling of this court in the case of *The State v. Miller*, 3 Zab. 383. The supplement to the road act, approved in 1860, (*Nix. Dig.* 751)* provides that, in assessing the damages sustained by the owner of land taken when a road is laid out, such damages are only to be what he sustains over and above the advantage that will accrue to said owner. But the act by which this action is authorized makes no such provision, which in such a case as this would be much less reasonable, because the fifth section enacts that the damages to be paid shall be assessed not on the community generally, but upon the lands and real estate benefited, in proportion to the benefits received; so that if the plaintiff did in fact reap a benefit by the alteration he will have to pay a proper share of his own damages.

Judgment affirmed.

*Rev., p. 998, § 13.

Brain v. Snyder.

JOHN BRAIN AND PETER BRAIN v. THOMAS R. SNYDER.

In an action of trespass *quare clausum fregit* before a justice of the peace, the defendant pleaded title and a right of way over the close in question. Upon such suit being brought in this court, the defendant filed six pleas. On motion to strike out pleas, it was

Held, that the first plea of not guilty, not being the same plea as that pleaded before the justice, must be stricken out; that the second plea of *liberum tenementum* is correct; that the fourth plea, that the *locus in quo* was a public highway, is not a plea of title, and is not good; that the third and fifth pleas, setting up a right of private way by prescription, and a right of private way by grant, if wrong, may be demurred to, but cannot be stricken out on motion; and that the sixth plea, that the *locus in quo* was a by-way, and that it had been opened by three of the chosen freeholders, does not amount to a plea of title, and must be stricken out.

In trespass. On motion to strike out defendant's pleas.

Argued at February term, 1862, before Justices OGDEN, VREDENBURGH, and BROWN.

For plaintiffs, *A. B. Woodruff*.

For defendant, *John Hopper*.

The opinion of the court was delivered by

VREDENBURGH, J. This is a suit originally commenced before a justice of the peace in trespass.

The defendant pleaded before the justice—first, that the trespasses complained of were by passing over a certain close, which close, for such purpose, was the close and freehold of him, the said defendant; and secondly, that, on the 1st of January, 1800, the owner of the close in which the trespasses were committed did grant to the owner of the close under whom the defendant held by deed, now lost, a right of way over the close in question, by virtue of which he did pass over the *locus in quo*. The defendant, having also filed with the justice a bond, as required by the statute, the justice dismissed the suit. The plaintiffs thereupon commenced

Brain v. Snyder.

this suit in the Supreme Court, and filed their declaration here in the same terms as before the justice, whereupon the defendant has come into this court and filed six different pleas. The motion is now made to strike out all these six pleas.

The first reason assigned for striking them out is, that none of them are the same as those filed before the justice.

The first plea is not guilty. As the declaration in this court is the same as that before the justice, it is clear, upon the current authorities, that it must be stricken out. 2 *Green* 471, and cases there cited.

The second plea is *liberum tenementum* generally. This is correct. 1 *Zab.* 83.

The fourth plea is, that the *locus in quo* was a public highway. This is not a plea of title of any sort. *Chambers v. Wambaugh*, 4 *Dutcher* 531, and cases there cited; *Campfield v. Johnson*, 1 *Zab.* 83, and must be stricken out.

The third plea is one of a right of private way by prescription.

The fifth plea is of a right of way by grant. If there is anything wrong in these pleas, it must be taken advantage of by demurrer, and not by motion to strike out.

The sixth plea is that the *locus in quo* was a by-way, and that it had been opened by three of the chosen freeholders. This does not amount to a plea of title, and must be stricken out. 4 *Dutcher* 309. The result is that the first, fourth and sixth pleas must be stricken out, and the third, fourth and fifth pleas will stand.

CITED in *Hawk v. Segraves et al.*, 5 *Vroom* 356.

Nixon v. Ruple.

WILLIAM NIXON v. SAMUEL RUPLE.

1. All parties are bound to take notice of the day appointed by law for the meeting of the commissioners of appeal in cases of taxation; but if the commissioners meet at any other time than that appointed by law such meeting must be upon notice, and must also be at the place of holding the town meeting, in order to obtain jurisdiction of the person of the assessor; and they cannot, therefore, without such notice alter his assessment.
2. The tribunal of the commissioners of appeal is a special tribunal, and it is well settled that such tribunals should show upon the face of their record all facts necessary to give jurisdiction.

On *certiorari* to Hunterdon Pleas.

Argued at February term, 1862, before Justices OGDEN, VREDENBURGH, and BROWN.

For plaintiff, *G. A. Allen* and *B. Van Syckel*.

For defendant, *John N. Voorhees* and *Van Fleet*.

The opinion of the court was delivered by

VREDENBURGH, J. This was an action of trespass, brought in the court for the trial of small causes by Ruple against Nixon, for taking, on the 21st March, 1859, twenty-one chestnut posts. Judgment was rendered for Ruple, which was afterwards affirmed by the pleas on appeal, whereupon this *certiorari* was brought.

The plaintiff below proved, on the trial, that the defendant did take the posts.

The defendant, Nixon, thereupon proved that he was a constable, and took and sold the posts by virtue of a tax warrant. The plaintiff replied by proof that the commissioners of appeal had remitted the tax, and that he showed the constable the transcript before the sale.

The first reason urged for reversal is, that the commissioners of appeal had no jurisdiction of the matter. It appears, by

Nixon v. Ruple.

the case, that the tax in question was a dog tax for 1858. The act of April 16th, 1846, (§ 16, *Nix. Dig.* 14,)* provides that every person who shall keep a dog shall be taxed fifty cents, and for every additional dog one dollar, provided that the inhabitants of every township may, at the town meetings, lay an additional tax on each dog not exceeding five dollars. It appears, by the case, that on the 4th January, 1859, the commissioners of appeal in cases of taxation, on an appeal to them, adjudged that the sum of \$3.13 was illegally assessed against Ruple, remitted the same and gave a transcript for the same; and it further appears, by the case, that before the constable sold under the tax warrant, Ruple showed him this transcript, and either paid or tendered him all the tax due, except the \$3.13; and that the property in question was thereafter sold to raise this \$3.13. The plaintiff in *certiorari* contends that, under this state of facts, the commissioners of appeal had no jurisdiction of the matter. He avers that this \$3.13 was raised by a vote of the township, at their annual town meeting, they having voted to make the dog tax under the statute \$3, instead of 50 cents, and that the commissioners of appeal had no jurisdiction thus to review and reverse the vote of the inhabitants at a town meeting. However correct this proposition may be, and upon which I do not express any opinion, I can find nothing in the case to prove that this three dollars was raised by any such vote, or that any such tax was raised by the town meeting. No such proof appearing, we are to presume that it was assessed without any such vote. In such case the commissioners of appeal clearly have jurisdiction.

The next objection raised to the judgment of the commissioners of appeal is, that it does not appear upon the face of their transcript that they gave any notice of their meeting on the 4th of January, 1859. *Nix. Dig.* 800, § 47,† provides that the commissioners of appeal shall, for the purpose of discharging the duties of their office, convene at the usual place of holding town meetings at such times as they shall

*Rev., p. 15, § 6. †Rev., p. 1148, § 46.

Nixon v. Ruple.

appoint, giving eight days' notice, in writing, at six of the most public places in the township.

The question is, whether, in this collateral proceeding, we can treat the action of the commissioners as a nullity.

Whether the notice of their meeting is a jurisdictional fact, and should appear upon the face of their proceedings.

If the question was before us directly, it would probably be set aside; but the questions are here collaterally.

The commissioners of appeal act judicially. They try, determine, and adjudge. They had jurisdiction of the subject matter. Had they jurisdiction of the persons of the parties? They had certainly of Ruple. Had they of the other party? By express statute it is made the duty of the assessor, under the penalty of ninety dollars, to be present at such meeting to defend his assessment. The proceeding, therefore, on appeal before the commissioners of appeal is in the nature of a suit wherein the party appealing is plaintiff and the assessor is defendant.

Now, can the commissioners of appeal get jurisdiction of the person of the assessor by meeting at any place and at any time without giving him notice, and alter his assessment? I think not, any more than a justice of the peace, without a summons, can give judgment against a defendant. The law prescribes the mode of proceeding of the commissioners. There is one day appointed by law, the 4th Tuesday in November, of which all parties are bound to take notice. If they meet at any other time, it must be upon notice, and the place of meeting must be that of the place of holding the town meeting.

Here it does not appear that the commissioners met, either at the right place, or gave any notice of the time of meeting. The only remaining question is, is it necessary that it should appear upon their transcript. The tribunal of the commissioners of appeal is a special tribunal, and it is well settled that all such tribunals should show all jurisdictional facts upon the face of their record. *Carron v. Martin*, 2 *Dutcher* 600.

Overman v. Hoboken City Bank.

It follows that the transcript shown the constable showed no remitting of the tax, the tax warrant remaining in full force, and that, consequently, the judgment of the pleas must be reversed.

Judgment reversed.

CITED in *State, Vail's Ex'rs, pros., v. Runyon*, 12 *Vroom* 103.

HENRY J. OVERMAN v. THE HOBOKEN CITY BANK.

1. Without stating in the declaration that the association called the "clearing house" is an institution authorized by special legislation, or any authority existing in such association, in any way, to alter or modify the law merchant in regard to checks or commercial paper, such association cannot be held to have power to make usages or rules to bind those who are not parties to its organization.
2. Its usages and rules, if not in conflict with law, may, by the implication of tacit adoption in the contracts of members, bind them in the same way that a general usage of trade may bind those who deal with reference to it, and who are therefore held impliedly to adopt it. But those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption, and bound by them *inter sese* only.
3. Customs and usages in derogation of the common law must be strictly pleaded, and when well pleaded the count must show a case clearly within the usage.
4. Whether a failure to return a check (when sent to the bank on which it is drawn) in a reasonable time amounts to an acceptance, must always depend on the particular circumstances of each case. A failure to return is not of necessity an acceptance; they are not convertible terms.
5. In order that a promise to accept a bill shall amount to an acceptance, the holder must have taken the bill on the faith of the promise, and until such negotiation there is no acceptance; it amounts to nothing but a contract between the drawer and drawee collateral to the bill, which, like all other contracts, must have a consideration to support it.

On demurrer to declaration.

Argued at February Term, 1862.

For the plaintiff, *S. B. Ransom*.

For the defendants, *J. H. Lyons* and *I. W. Scudder*.

Overman v. Hoboken City Bank.

The opinion of the court was delivered by the

CHIEF JUSTICE. This is a special action on the case against the defendant, upon whom Andre & Brother had drawn a check, dated October 29th, 1859, for \$2730.

The case is before us upon demurrer to the plaintiff's declaration. The defendant has taken issue on the first and fifth counts of the declaration, and demurred to the second, third, and fourth counts.

The difference in the frame of these three counts will render an examination of each necessary to the proper decision of the case.

The second count, after alleging the drawing of the check, and its delivery to the plaintiff, who was its payee, proceeds to state that at that time it was, and ever since has been the established rule, use, and custom of the association of banks, called the "clearing house" of the city of New York, and of all the banks of the city and elsewhere belonging to and connected with the clearing house, and of the defendant, that any check drawn upon any one of the said banks, and received in payment or for collection, of any other of the said banks, and presented by the bank receiving the same through the clearing house to the bank against which the said check was drawn, should be returned, if not paid, to the bank presenting the same for such payment on the same day on which it was so presented, or at furthest early on the morning of the day after the said presentation for payment and before the commencement of the business hours of that day, or in default thereof, that the said bank thus failing to return the said check should be liable to the holder thereof to pay the amount of the check, whether having funds of the drawer or not. The count then states that the Ocean Bank and Bank of Commerce were both members of the clearing house, and had assented to and were bound by the rules and usages set forth; that the Ocean Bank had been appointed, and was the agent of the defendant to redeem its bills and pay drafts on it at the banking house of the Ocean Bank in New York, and to receive and return through

Overman v. Hoboken City Bank.

the clearing house drafts and checks drawn on the defendant, in conformity to the rule of the clearing house just stated; and that the Ocean Bank had for a long time so done business with and for the defendant, and that the defendant had for a long time conformed to the said usage, and agreed to be bound by it; that the plaintiff, on the 29th of October, 1859, deposited this check for collection with the Bank of Commerce, which bank, on the 31st, the 30th being Sunday, duly presented the check, and demanded payment thereof of the defendant, through its agent, the Ocean Bank, at the clearing house in the city of New York, according to the usage stated as that of the New York banks and of the defendant, and that the defendant retained the said check, without notice of nonpayment, from that time until the second day of November, when it returned the same to the Bank of Commerce with notice of nonpayment; that Andre & Brother failed on the first of November; that by reason of the neglect to return the check in time, the plaintiff has lost the money.

It will be observed that the count does not state directly the existence or mode of organization of the association called the "clearing house," nor does it show whether it is an institution authorized by special legislation, or merely a private organization. No authority is shown to exist in the association, in any way, to alter or modify the law merchant in regard to checks or commercial paper.

Such an association can have no power to make usages or rules to bind those who are not parties to its organization. Its rules and usages, if not in conflict with law, may by the implication of tacit adoption in the contracts of members, bind them in the same way that a general usage in trade may bind those who deal with reference to it, and are therefore held impliedly to adopt it. *Robson v. Bennett*, 2 *Taunt.* 388; 1 *Parsons on Con.* 229.

But those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those

Overman v. Hoboken City Bank.

who are parties to their adoption, and bound by them *inter sese* only.

It is manifest that the usage and rules set up in the count were adopted by the associated banks for their own convenience, and to facilitate the transaction of business and avoid the trouble and expense of special messengers to demand payment of checks, bills, and notes, and not for the purpose of enlarging the rights of the holders of commercial paper who are not members of the association. It was a rule designed to operate strictly among themselves for their own convenience in the despatch of business.

Neither the plaintiff nor the defendant were members of the association, nor does the declaration state that the plaintiff, when he left the check with the Bank of Commerce, knew of the existence of the usage, or in any way modified his contract with that bank for the collection of the check so as to embrace the benefit of the usage for himself.

If the Bank of Commerce, in pursuance of the usage, had a right to hold the Ocean Bank for a failure to comply with its terms, could not that bank relieve the Ocean Bank of such liability without incurring any to the plaintiff? It could do so, for the manifest reason that this usage, in contravention of the common law, formed no part of the contract between the plaintiff and the Bank of Commerce. It could not, unless adopted and sanctioned by both the parties, be binding on both.

That the Bank of Commerce, in the collection of the check, acted as agent of the plaintiff can make no difference. This fact would not bring the case within the operation of the rule, that the principal is entitled to the benefit of the contract of the agent, while transacting the business of the principal.

This is undoubtedly true as to all the legal rights acquired by the agent for the benefit of the principal; but we have already said that this was a mere labor-saving usage, designed for the exclusive benefit of the agent, the adoption of which could not affect the principal without his assent.

Overman v. Hoboken City Bank.

If the Bank of Commerce had omitted its duty in the presentation of the check in due time, so that by the failure of the defendant the plaintiff had lost his money, it would have been responsible to the plaintiff for that neglect.

That is not the allegation here; but the insistment of the plaintiff is, that his agent, the Bank of Commerce, and the defendant's agent, the Ocean Bank, had an arrangement, or were parties to one, by which the defendant was to be responsible for the amount of the check if the Ocean Bank did not return it to the Bank of Commerce on the same day it was presented to the Ocean Bank, or the next morning before ten o'clock.

The usage is defectively set forth in the count, if the meaning of the pleader was to state that this check was to be left, by the presenting bank, with the bank on which it was drawn, or its agent. It is supposed that was the intention of the pleader.

It would be impossible for a bank upon which a check was drawn, to return it by a given time, if it were not left in the possession of that bank; if merely presented by the collection bank without parting with the possession, no return would be possible; nothing could happen in case of nonpayment but a mere refusal to pay.

If, therefore, that was the usage, and it was so set forth in the count, it is defective in not setting forth that the check was delivered by the Bank of Commerce to the defendant, or its agent, the Ocean Bank.

The declaration is defective in not setting forth the usage intelligibly. As it is set forth, it is absurd; and if it were set forth as I have supposed it was intended to be, the usage was not complied with.

Customs and usages in derogation of the common law must be strictly pleaded; and when well pleaded, the count must show a case clearly within the usage. If a case can be conceived calling for the application of the rule, it is the present, where it is attempted to make the defendant liable,

Overman v. Hoboken City Bank.

by mere force of usage, to pay a check of a drawer without any funds of his in its hands.

The usage pleaded is, that when a check is presented at the clearing house *to a bank against which the said check was drawn*, then if not returned within the same day, or the next, before ten o'clock, the bank on which it was drawn shall be liable.

It does not cover the case of a presentation to an agent. The presentation must be *to the bank on which it was drawn*. This is an essential difference. For such a purpose, the agent does not represent the principal. The usage, if contemplating a presentation to the principal, may be reasonable, and very unreasonable if extending to the agent. The plaintiff has failed to bring his case within the usage.

This count cannot be supported upon the ground that the facts alleged show an acceptance independent of the usage. The count does not show that the check ever was in possession of the defendant: if not, there could be no failure to return it so as to make the defendant liable. Whether a failure to return a check (when sent to the bank on which it is drawn) in a reasonable time amounts to an acceptance, must always depend on the particular circumstances of each case. *Jenne v. Ward*, 2 *Starkie* 326, and cases there cited.

A failure to return is not of necessity an acceptance: they are not convertible terms. It may or may not be: there may be a sufficient excuse for the failure. If the plaintiff relied on an acceptance, he should have stated it, as he has done in the first count.

The third count alleges the drawing of the check in New York, as in the second, by the same persons, and its delivery to the plaintiff and the existence of an usage of the defendant to receive, through the Ocean Bank of New York, demand of payment of checks drawn upon defendant in New York; that the Ocean Bank was its agent for that purpose, and that it was the usage and agreement between that bank and defendant that all checks drawn on it in New York, or used there and presented to the defendant through the

Overman v. Hoboken City Bank.

Ocean Bank, which should not be returned to the holders thereof on the same day, or the day after before ten o'clock in the forenoon, should be paid by the defendant (without saying to whom); that the plaintiff, relying on the said usage and agreement between defendant and the Ocean Bank, presented this check, on the 31st October, 1859, to the Ocean Bank for payment; that that bank, on the same day, presented it to the defendant for payment; that defendant received the check from the Ocean Bank on that day, and that the defendant did not return the same to the plaintiff, the holders thereof at that time, either on that day or the next, before ten o'clock in the forenoon, and that by means thereof and by force of the agreement between the Ocean Bank and defendant, and by force of the statutes of New York, the defendant became liable to pay the amount of the check to the plaintiff.

The plaintiff's action on this count is not for a breach of a promise to accept the check, and pay it—not for an acceptance,—but is founded entirely on an usage and agreement between its agent, the Ocean Bank, and the defendant, to pay all checks drawn or used in New York on the defendant, and presented to it through the Ocean Bank, unless returned the same day or the next before ten o'clock in the forenoon. The count does not allege that defendant had any funds of the drawer, or that the plaintiff sustained any special damage by the failure to return the check.

The plaintiff avers that he was the holder of the check at the time of presentation, and that he presented it to the Ocean Bank, who at the time was the agent of the defendant, to receive demand of payment.

Under this state of facts, the plaintiff shows no interest in the contract on which he counts. He shows himself as a stranger to it in every sense. The Ocean Bank is not his agent, but that of the defendant; he can claim no benefit of a contract between the defendant and its agent. As a contract, it is *nudum pactum*; no consideration is shown as passing either from the Ocean Bank or the plaintiff.

Overman v. Hoboken City Bank.

Upon what possible grounds can the plaintiff claim the right to enforce a promise, for which there was no consideration, to the terms and parties of which he is a stranger? As was remarked in regard to the last count, the facts pleaded are not equivalent to an acceptance.

The fourth count states the making and delivery of the check; the agency of the Ocean Bank for the defendant; the established usage of the defendant to pay checks on the defendant presented at the Ocean Bank, if not returned as above stated; that the plaintiff was cognizant of the usage; that he presented the check at the Ocean Bank, and demanded payment; that defendant, through that bank as its agent, received the check, took possession of it, and promised the plaintiff to pay it if not returned as above stated; that it was not returned, and has not been paid; that Andre & Brother, the drawers, became insolvent on the first day of November, after ten o'clock, and before the check was returned.

The attempt in this count is to charge the defendant with the check on the footing of an express contract between the plaintiff and defendant to pay the check, if not returned within the given time.

If this is to be treated either as a promise to accept or a promise to pay it cannot avail the plaintiff. No consideration to support the promise is stated or appears. It is not the case of a check taken on the faith of such a promise. The holder gave nothing for the promise—relinquished no advantage—nor did he take the check because the drawers had made any absolute or conditional promise to pay it. The drawees never did accept it, nor did their agents.

All the cases which hold that a promise to accept a bill amounts to an acceptance, put the doctrine on the ground that the holder has taken the bill on the faith of the promise; that until such negotiations there is no acceptance, nothing but a contract between the drawer and drawee collateral to the bill, which, like all other contracts, must have a consideration to support it. *Mason v. Hunt*, Doug. 297; *Pierson*

Handlong v. Barnes.

v. *Dunlop*, Cowp. 571; *Coolidge v. Payson*, 2 Wheat. 66; *Johnson v. Collings*, 1 East 98; *Clark v. Cock*, 4 East 57; *Schimmelpennich v. Bayard*, 1 Pet. 284; *Boyce v. Edwards*, 4 Pet. 111; *Russell v. Wiggins*, 2 Story's C. C. Rep. 237; *Adams v. Jones*, 12 Pet. 207; *Carrigus v. Morrison*, 2 Metc. 381.

I can find nothing in this case to distinguish it from that of a contract without consideration, and therefore *nudum pactum*.

The three counts demurred to are all defective.

Judgment for demurrant.

GEORGE HANDLONG AND WIFE v. ELISHA BARNES ET AL.

1. In a suit in which husband and wife are joined are parties, neither is a competent witness for or against the other.
2. Under the "act concerning witnesses" (*Nix. Dig.* 928), neither husband nor wife, in any suit or proceeding in which they are joined as parties, is a competent witness for or against the other.
3. Under the same act, neither party can be sworn when the other party is prohibited by any legal disability.

In ejectment. Case certified from the Warren Circuit Court.

Argued at February term, 1862.

For the plaintiff, *J. M. Robeson* and *J. G. Shipman*.

For the defendant, *D. A. Depue*.

CHIEF JUSTICE. Handlong and wife sued Barnes, in ejectment, for lands which they alleged were the property of Mrs. Handlong, as heir-at-law of her father. At the trial, Barnes was offered as a witness and rejected. The point to be decided is, was he a competent witness?

The supplement to an act concerning witnesses (*Nix. Dig.* 928)* declares "that no person shall be disqualified as a witness, in any suit or proceeding at law or in equity, by reason of his or her interest in the event of the same, as a party or

*Rev., p. 378 § 3.

Handlong v. Barnes.

otherwise, &c. ; provided, that no female shall be admitted as a witness for or against her husband, except when the suit or proceeding is between her and her husband, or shall any party be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness."

The ground of the rejection was, that neither Handlong nor his wife could be sworn because disabled to testify for or against each other, and that therefore Barnes was incompetent.

The language of the act is peculiar. It does not declare the parties, *as such*, competent witnesses, but the interest arising out of this relation to the case shall not render them incompetent. If they were incompetent for other reasons than being parties, that incompetency is not taken away. Without entering into an examination of the authorities and text books upon the point, I am satisfied, by the great weight of authority as well as by the reason of the rule, that by the common law, neither a husband or wife could in civil cases be witnesses for or against each other. The rule was inflexible, and rested partly upon the ground of their legal identity and joint interest, and partly upon considerations of policy in regard to the marriage relation, to preserve domestic peace and harmony, and the unreserved confidence which the marriage relation implies and requires. Whether the husband or wife were or were not parties to this suit did not matter; neither could give evidence to support or destroy a right claimed by the other. This rule was the same whether they were sworn for or against each other. *Jackson v. Miller*, 1 *Dutcher* 93; *Erwin v. Smaller*, 2 *Sand. S. C. Rep.* 340; *Hasbrouck v. Vandervoort et al.*, 4 *Sand. S. C. Rep.* 599; *Davis v. Dimock*, 4 *T. Rep.* 678; *Barker v. Dixie*, *Cas. Temp. Hardwicke* 264; *Stapleton v. Crofts*, 18 *Adolph. & Ellis* 368, per Lord Campbell, Ch. Justice; *Bentley v. Cooke*, 3 *Doug.* 422; *Hossack v. Rogers*, 8 *Paige* 229, 241; *Windham v. Chetwynd*, 1 *Burr.* 424; *The People, ex rel. Barry, v. Mercein*, 8 *Paige* 47, 56; *Snyder v. Snyder*, 6 *Binney* 483, 488; *Batthews v. Galindo*, 3 *Car. & Payne* 238;

Handlong v. Barnes.

Hasbrouck v. Vandervoort, 5 *Seld.* 157; *Tiley v. Cowling*, 1 *Ld. Raym.* 744; *Stein v. Bowman*, 13 *Pet.* 221; 1 *Greenleaf's Ev.*, § 341, 344; 1 *Phillips' Ev.* 83; *Holdfast v. Dowling*, 2 *Strange* 1253; *Hawkesworth v. Showler and Boyce*, 12 *Mees. & Wels.* 45; *Alcock v. Alcock*, 12 *Eng. Law and Eq.* 354; *O'Connor v. Majoribanks*, 4 *Mann. & Gr.* 435; *Burrell v. Bull*, 3 *Sand. Ch. Rep.* 15; *Rex v. Cliviger*, 2 *Term Rep.* 263; *Gilbert's Law of Ev.* 252.

These cases show most conclusively that the rule did not rest upon the ground of pecuniary interest, but upon the broad ground of the importance of preserving the sanctity of the marriage relation, by removing this ground of difference and preserving unimpaired that entire unity which is the essential feature of marriage by the common law. As Lord Coke has quaintly put it, a wife cannot be produced either against or for her husband "*quia sunt duæ animæ in carne una.*"

The proviso does not alter the construction of the act. It was inserted probably for abundant caution, but it confirms the view just taken. It indicates the legislative will, that the act should not alter the position of a wife so as to qualify her for or against her husband.

Our statute has removed but one ground of incompetency of parties, that is interest. Handlong could not have been sworn for his wife, if she is to be regarded as the party within the act, nor could she have been sworn for him, if he is to be considered the party.

Lord Demans' act, to be found in *Powell on Ev.* 393, removed the disqualification of interest, but provided that the party to the suit, &c., or the husband or wife of the party, should not be sworn by virtue of the act. The act, 14 and 15 *Vict., cap. 99*, *Powell on Ev.* 397, repealed this proviso, and, by express provision, admitted the parties as witnesses for or against each other. So that, under the two acts, the objection as to interest was removed, and the parties expressly made competent. Under these acts, in *Stapleton v. Crofts*, 18 *Q. B., Adol. & Ell.* 367, the Queen's Bench de-

Handlong v. Barnes.

cided that, in a suit brought against her husband, the wife was not a competent witness for him.

In *Barbat v. Allen*, 7 *Exchequer Rep.* 609, 612, the Court of Exchequer decided that the defendant's wife was not a competent witness for him, upon the ground that at common law she was not competent, and that the removal of the objections of interest did not render her competent. These cases, decided as they were by Lord Campbell and Baron Parke, respectively, satisfy my mind that the view I have taken is correct. Nor is my conclusion at all shaken by the case of *Merriam v. The Hartford and New Haven Railroad Company*, 20 *Conn.* 354, cited and much relied upon by the defendant's counsel.

Two things are plain upon the construction of our act.

1. That the legislature did not mean to interfere with the competency of husbands and wives as witnesses for or against each other.

2. That neither party was to be sworn when the other could not be, or had died; so that the act would operate fairly, giving neither one advantage over the other.

The Circuit Court should be advised that Barnes was not a competent witness.

ELMER, J. In an action of ejectment by husband and wife for land claimed by the wife, one of the defendants was offered as a witness; and being objected to by the plaintiffs, and rejected by the court as incompetent, the single question referred to us for our opinion is whether the witness was rightly rejected. This depends, as both sides agree, upon the question, whether the wife of one of the plaintiffs, herself the other plaintiff, and suing to recover her own property, could be a witness.

Without deeming it necessary to examine the numerous cases, more or less bearing on this question, which were referred to by the counsel who so ably argued this cause, I think the proviso of our act concerning witnesses, approved in 1859, 3 *Nix. Dig.* 928,* is too plain to leave any serious

**Rev.*, p. 378, § 3.

Hoboken v. Harrison.

doubt what ought to be our decision. Independently of this act, neither party could be a witness. The proviso, which is not found in other acts for the same general purpose, is, that "no female shall be a witness for or against her husband, except when the suit or proceeding is between her and her husband." If the wife was admitted as a witness for plaintiffs, I do not see how it can be denied that she would be a witness for her husband, although she would be a witness mainly for herself. He is a necessary party to the suit, and the judgment will be necessarily either for or against him, as well as for or against her. The principle adopted by this court in the case of *Myers v. Hollingsworth*, 2 *Dutcher* 187, and by the English and American courts in most of the cases that have arisen under the new statutes regulating evidence, that the ancient rules are to be adhered to in all cases where it does not clearly appear that the legislature meant to alter them, is in my opinion the only safe one, and ought to be carefully adhered to. I am therefore of opinion that the witness was rightly rejected, and that the Circuit Court should be advised to refuse a new trial.

CITED in *Yetman v. Day*, 4 *Vroom* 32; *Metler v. Metler's Adm'r*, 4 *C. E. Green* 460.

THE MAYOR, ETC., OF HOBOKEN v. HARRISON, HARP, AND WALKER.

1. The powers of a municipal corporation are derived from its charter. It cannot, without express authority from the charter, create an office, define its duties, appoint an incumbent, and clothe him with the powers of a municipal officer.
2. Where an officer of a municipal corporation gives his official bond with sureties, which bond recites that he has been appointed "collector of assessments for street improvements," with condition that "he should well and truly pay to the treasurer of said city all moneys which he might collect or receive as such collector as aforesaid," &c., the sureties are estopped from denying that such officer was *de facto* a collector of assessments for street improvements, and their liability to pay over what he has collected is co-extensive with his liability.
3. The fact that bonds are not prescribed by law does not necessarily in-

Hoboken v. Harrison.

validate them, although given by a public officer as security for the discharge of his duties, if they are not unlawfully exacted of him : if voluntarily given, they are binding upon the parties to them.

4. By the charter of the city of Hoboken, "street improvements" do not include the building of sewers, and an officer may well be a collector of assessments for "street improvements," and not of sewer assessments. Sureties on such bond ought not to be held upon their admissions beyond its fair limits. Estoppels by deed are to be strictly construed.
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In debt. On demurrer to declaration.

For the plaintiff, *F. B. Ogden*.

For the defendants, *J. H. Lyons* and *I. W. Scudder*.

The facts are set forth in the opinion of the court.

CHIEF JUSTICE. This is an action brought on what, upon its face, purports to be the official bond of Harrison, as collector of assessments for street improvements. The other defendants are sureties. The condition of the bond recites that Harrison had been duly appointed by the plaintiff collector of assessments for street improvements, and stipulates for the faithful performance of all the duties of his said office of collector of assessments, and that he should well and truly pay to the treasurer of the city all moneys which he might collect or receive as such collector, at the time and in the manner prescribed by any ordinance, or which should or might be required by any resolution of the said council, approved by the mayor, in the same manner as ordinances are required to be approved by him, and should also do and perform all other matters and things appertaining to his said office of collector of assessments according to law. The bond bears date on the 14th July, 1858.

The plaintiff has assigned several breaches of the condition.

1st. A breach in the negative of the words of the condition.

2d. That an ordinance of the 30th June, 1858, charges the

Hoboken v. Harrison.

collector of assessments with the duty of collecting all assessments which are confirmed according to law for street improvements or for any sewer in said city; that, on the 16th November, 1859, a certain assessment for a sewer through Newark and Washington streets was confirmed, amounting to \$13,-117.41; that it was recorded by the city clerk in an assessment book which was delivered by the city clerk to him; that he collected, as such collector, the whole money upon it, and did not pay over to the city treasurer according to the conditions.

The third breach states similar facts in regard to another assessment of \$20,943, collected by him as such collector, and nonpayment.

The fourth breach states the confirmation of an assessment for the improvement of certain streets, amounting to \$11,-897.27, and the recording of it, and putting the book into his hands for collection; that he collected the money, as such collector of assessments, and did not pay it over.

To this declaration the defendants have demurred.

The principal ground relied upon by the defendants is, that the ordinance creating the office of collector of assessments is *extra vires*, no such power being conferred by the charter, which did not create the office.

The powers of a municipal corporation are derived from its charter. It cannot, without express authority from the charter, create an office, define its duties, and appoint an incumbent, and clothe him with the powers of a municipal officer.

A collector of assessments for street improvements of the city of Hoboken is not such a subordinate officer as is contemplated in the act concerning corporations. It is manifest, from the whole charter, that it was the legislative intention itself, to create all the offices and designate all the officers to be elected or chosen by the city or the city authorities, and to regulate the mode of appointment. The third section of the act declares, that hereafter, and until otherwise provided by law, there shall be elected in and for the said city a mayor, a treasurer, a clerk of the city, a collector, a col-

Hoboken v. Harrison.

lector of arrears of taxes, and overseer of the poor, a superintendent of common schools, a street commissioner, a pound-keeper, a chief engineer of the fire department, and one assistant engineer, all to be elected for one year and by the people, except the chief engineer and assistants of the fire department, who are to be elected by the department.

The powers of the council are defined, not only in regard to their general powers of legislation, but the officers which they may appoint are ascertained, a keeper of the city prison, a weighmaster, an inspector of lumber, firewood, coal, and other fuel.

It would be in gross contravention of a charter, which provides for a treasurer, a collector of taxes, and a collector of arrears of taxes, to be elected by the people for one year, to hold that the common council might appoint, as they did in this case, a collector of assessments to hold for an indefinite period. Their charter being silent on the subject, it was in the power of the common council, by ordinance, to direct the collection of assessments for street improvements to be made by the collector of taxes, or collector of arrears of taxes, in any manner not inconsistent with the charter. Indeed, I am not able to see why these officers were not *ex officio* clothed with power to collect the assessments. The charter does not, in express terms, give even the collector of taxes power to collect them; he has it, however, by fair and necessary implication from the nature of his office.

If the ordinance passed June 30th, 1858, is to be regarded as creating a new office, which without doubt was its design, it was beyond the power of the common council, and for that purpose void. If, however, it can be construed as regulating the proceedings of the collectors of taxes in the collection of assessments for street improvements and sewers, it may possibly be sustained; and if it were necessary to do so, in order to do justice in this case, I should be inclined to adopt that view. For many purposes an assessment is synonymous with tax, particularly so when the tax is, as declared by this char-

Hoboken v. Harrison.

ter when assessed upon lands, whether for general or particular purposes, a lien upon the land.

This case may be put upon grounds clear of the many difficulties that lie in the way of that view.

The declaration charges the collection by Harrison of certain sums, as collector of assessments for street improvements, and certain other sums for sewers, and his refusal and neglect to pay over these sums to the city. It shows him in possession of large sums of money paid by the taxpayers into his hands, as a lawful collecting officer of the city; treated as such both by the mayor and common council, the taxpayers, and the sureties upon this bond. The plainest principles of justice require that, in a suit against him by the corporation, he should not be permitted to avoid the payment of the money which he has received under the color of his appointment for the use of the city; *he* would be stopped from setting up the invalidity of his appointment, and would be held to the responsibilities of an officer *de facto*.

By the condition of this bond, it is recited, that whereas the said William R. Harrison had been duly appointed by the mayor and common council of the city of Hoboken as *collector of assessments for street improvements*, that if he should well and truly pay to the treasurer of said city all moneys which he might collect or receive as such collector as aforesaid, &c.

By this condition, the sureties have admitted that his election was by the mayor and common council, and agreed to be sureties for the payment of all moneys which by virtue of the appointment, thus made, he might receive. They are estopped from denying that Harrison was *de facto a collector of assessments* for street improvements. Their liability to pay over what he has collected is co-extensive with his.

In a suit for moneys collected by him as such, neither the officer *de facto* nor his sureties may set up the invalidity of his appointment in bar of the action.

The action is not to enforce upon him the execution of the duties of his office, or to recover damages for his failure to

Hoboken v. Harrison.

perform them. In such a case both he and his sureties might answer and say, perhaps successfully, there was no such office, and I was without legal power; but here the suit is founded upon an actual complete execution of the duties of the office he claims to fill: he is *functus officio* as collector of taxes. The money he has is the money of the city, which he has no right to retain, and which his sureties, on the whole case just as it is, have stipulated that he shall pay over to the city treasurer. *Seiple v. Borough of Elizabeth*, 3 *Dutcher* 410.

Nor does this view of the case conflict with any settled rule of law.

The bond was not exacted from the defendant in a case where no bond could be taken, as a condition of his enjoying his office, or where the statute prescribed a bond with another condition. It was not a bond for ease and favor, taken by an officer in violation of his duty. The bond was given in good faith by Harrison, supposing he was the lawful incumbent of an existing office to which he had been appointed.

To permit the enforcement of the bond, so far as it stands as a security for the public money in the hands of Harrison, does not violate any rule founded on public policy or legislation.

It would seem to be eminently impolitic to permit the parties to such a bond to escape its obligations by contradicting the recitals of the bond, and thus retain from the public authorities the taxes received by an officer *de facto*.

The fact that bonds are not prescribed by law, does not necessarily invalidate them, although given by a public officer as a security for the discharge of his duties, if they are not unlawfully exacted of him; if voluntarily given, they are binding upon the parties to them. *Woolwich v. Forrest*, *Pennington* 115; *United States v. Tingey*, 5 *Peters* 129; *Tyler v. Hand*, 7 *Howard* 581; *United States v. Bradley* 10 *Peters* 361.

These cases directly decide that such bonds are valid. If,

Hoboken v. Harrison.

then, he was a collector of assessments *de facto*, and he and his sureties in this action are estopped from denying it, a bond voluntarily given by him as security for the discharge of his duties may be enforced, so far as his duties have been executed.

The remaining question is, are the sureties liable for the moneys collected by him assessed for sewers, as stated in the third breach assigned.

In the view I have taken of this case, the liability of the sureties rests upon the recital of the condition of the bond, that he was in fact collector of assessments for street improvements. By the charter, street improvements and building sewers are different things; the latter is not included in the former, and Harrison might well be a collector of assessments for street improvements, and not of sewer assessments. The sureties ought not to be held upon this bond upon their admissions beyond its fair limits: estoppels by deed are to be strictly construed.

They have admitted that Harrison was a duly appointed collector of assessments for street improvements, nothing more. They agreed to be liable for all he should receive as such.

The ordinance is not incorporated into the bond by reference, so that the sureties may be held to have admitted that it was a part of his duties to collect sewer assessments.

This breach is not well assigned, and there should be judgment for the defendants upon it. As to the others, the judgment must be for the plaintiff.

CITED in *Paret v. Bayonne*, 10 *Vroom* 564; *Ordinary v. Cooley*, 1 *Vroom* 181.

State v. Snedeker.

THE STATE, GARRET A. SNEDEKER, PROSECUTOR, v. THOMAS S. SNEDEKER ET AL.

1. Where a turnpike road has been abandoned for many years by the company which built it, and has been used by the public as an ordinary highway, and repaired at the public expense, it becomes subject to the laws concerning roads, and the surveyors of the highways have power to vacate it.
2. A plaintiff in *certiorari* cannot, unless holding the rights of the turnpike corporation, assign, as a reason for setting aside the action of the surveyors, that it is in violation of the rights of the company.
3. Every citizen is interested, more or less, in every highway, and has a right to submit any questions affecting such interests to the court.

In matter of road. On *certiorari* to the Middlesex Pleas.

In 1860, an application was made to the Court of Common Pleas of Middlesex for the appointment of surveyors of the highways to vacate a certain road, then used as a public highway, in the township of Monroe, in said county. The appointment was made, and the surveyors, after viewing the premises, vacated the road, and made return of their proceedings according to law.

Garret A. Snedeker, the prosecutor, a citizen interested in the continuance of the road, sued out a writ of *certiorari*, and removed the proceedings into this court, and has assigned various reasons for setting them aside. The principal reasons are, that the road vacated by the surveyors was not a public highway within the meaning of the act concerning roads; that it was a part of a turnpike road, constructed under authority of an act to incorporate a company to erect a turnpike road from Bordentown to South Amboy, passed in 1816; that the charter of said company had not expired, nor had it been forfeited, but remained in full force; that the land on which the road was built had been conveyed in fee simple to the company, who are still the owners, and therefore that the surveyors had no authority to vacate the said highway.

Evidence was taken, on both sides, under authority of the

State v. Snedeker.

court, from which it appeared that the road vacated was part of the Bordentown and South Amboy turnpike road, as originally built by the company, in 1817, and that it had been traveled by the public from that time until about two or three years before the application to vacate was made, within which period the travel was interrupted by fences put across the road on several occasions, which were taken up, and gave rise to disputes. It further appeared that, since 1833, the turnpike company had held no election for officers, and had ceased to exercise their corporate franchises, or collect tolls, or transact any business; that the road had been left open to public use, and that the part vacated had been taken possession of and worked by the township.

The case was argued before Justices BROWN and VREDENBURGH.

For the prosecutor, *A. V. Schenck*.

For the defendants, *H. V. Speer*.

The opinion of the court was delivered by

VREDENBURGH, J. The first reason assigned for reversal is, that at the preceding term of the Middlesex Pleas, they had appointed surveyors to view and vacate this road, who had made no return. But I do not find any legal evidence in the return or paper that any such appointment had been made. If any had been, it should have appeared by a duly certified copy of the record of appointment.

All the other reasons are embraced in the general one, *viz.* that the surveyors had no jurisdiction of the subject matter.

It appears, by the case, that the *locus in quo* is a portion of the old Bordentown and South Amboy turnpike, chartered in 1816, and built in 1817, and that the company has ceased to exercise any rights or duties over it since 1833, and since that time it has been worked by the public authorities, and

State v. Snedeker.

used by the public generally as a public highway, and that the surveyors of the highways, under the appointment of the Middlesex Pleas, vacated the portion in controversy on the 15th November, 1860—to set aside which vacation this *certiorari* is brought.

It does not appear that the prosecutor of the *certiorari* is either a director or stockholder, or any way interested in the turnpike company. It is not a question, therefore, between the surveyors or the applicants and the turnpike company. The prosecutor has no rights by reason of any relation to the turnpike company. If the prosecutor has any rights in relation to the action of the surveyors it is not because the *locus in quo* is a turnpike, but because it is a public highway. The proof is that the *locus in quo* has been an ordinary public highway since 1833, used and worked by the public. Every citizen is interested, more or less, in every highway, and has a right to submit any questions affecting such interests to the courts; so that the prosecutor has a right to take the opinion of this court whether the *locus in quo* has been legally vacated by the surveyors as a public highway.

The prosecutor objects that the surveyors have no jurisdiction of this matter, because the *locus in quo* was originally made a highway by authority of a charter, and as a turnpike, and by a turnpike company. But it was none the less a highway because it was a turnpike. When first built and opened by the company it was a highway, and it has ever since so remained. As between the stockholders and the surveyors of the highways, the surveyors had no power to alter the rights of the company because they held under a special act of the legislature; but if the stockholders chose to waive their rights under the charter, no other persons can step in and say they shall not, or assume, as against the public, their rights. Suppose, instead of bringing this *certiorari*, the prosecutor had undertaken to put up tollgates, and make the public pay toll. Such acts, as against the public, would clearly be illegal and void. Nor can the prosecutor,

State v. Snedeker.

when the public are using it as a highway, set up any rights as representing the turnpike company. When, therefore, the turnpike company abandon their rights as a chartered company over a laid out turnpike, the turnpike remains as a public highway like any other highway, and subject to any general laws regulating highways, and especially so if it has been accepted, used, and worked by the public as such. When, therefore, the surveyors of the highways, under their appointment, came to act on the *locus in quo* they had jurisdiction over the subject matter, not because it was a turnpike, but because it was a public highway. The surveyors found it *de facto* a highway, and it was a matter indifferent to their jurisdiction how it originated, whether by long usage, dedication, or laid out by surveyors originally under authority, as this was, of a special charter. In dealing with it, their authority was only limited by the rights of the turnpike company, which the company could waive if they saw fit, and which no one not holding under them has a right to raise; therefore the power and jurisdiction of the surveyors over this highway is the same as they have over any other highway, except only as to those holding under the turnpike company, and entitled to their chartered rights.

The question therefore is, as between these parties, what are the powers of the surveyors over the *locus in quo* considered as a public highway, however originating?

It does not appear, by the case, that the *locus in quo* is in any street in any of the cities, towns, or villages in the state. It does not appear that the prosecutor adjoins, or has built or made any improvements adjoining or upon the *locus in quo*, or has made any improvements upon the faith of this being and remaining a public highway. It would be, I think, a very grave question if a person had built upon and made valuable improvements adjoining upon a highway, upon the faith of its remaining such, whether the surveyors could receive from the legislature constitutionally any power to vacate any public highway rendering his improvements valueless, or greatly diminishing their value; or if they could vacate it as a public highway, whether the owners of the soil

State v. Snedeker.

could shut it up. These are questions which may become of very great importance, but I am not aware that any judicial action has been ever had thereon. But however important, they are not necessary to be decided in the present case, because it does not appear, by the return or the evidence, that the prosecutors have any such interest. It does not appear that they have any interest in the question, except as citizens of the state living off from the *locus in quo*, and only interested in it to the extent of using it occasionally for the right of passage; no more legal interest in the question than the inhabitants of Sussex or Warren may have. The question is therefore the general one—had the surveyors of the highways constitutional power to vacate an ordinary highway in the open country, upon which were no towns, villages, or cities, and no improvements made by the prosecutors?

This is the first time that the question has been raised, as far as I am aware. As long as it remains a public highway the public are liable for its repairs, and they have a clear right to relieve themselves from its burthen whenever it is judicially established that it is no longer necessary for the public use. When it affects private rights by means of buildings or improvements on its line, it is another question, upon which the court wishes to be understood as expressing no opinion. This *locus in quo* is now a highway. The township have accepted it by keeping it in repair for twenty years; they are indictable for not repairing. The only way of relieving the township from this expense is by the action of the surveyors vacating it. We must assume, upon this argument, that it is useless as a highway. How is the township ever to relieve itself from this expense if it cannot be vacated? A useless charge would be created in perpetuity, if the surveyors have no jurisdiction of the subject matter. I think that, as between the litigants here, the surveyors clearly had jurisdiction, and that their proceedings must be affirmed.

Proceedings of the surveyors affirmed.

CITED in *Wood v. Heard*, 5 Vroom 91; *State, Gregory, pros., v. Jersey City*, 5 Vroom 399; *State, Hudson Co. Land Imp. Co., pros., v. Seymour et al., Com'rs*, 6 Vroom 59; *Attorney General v. M. & E. R. R. Co.*, 4 C. E. Green 394.

Doremus v. Bush.

JOSEPH DOREMUS v. JOHN M. BUSH.

A debtor under bond, usually called an insolvent bond, need not surrender, and be placed in closed confinement before the filing of an undertaking by a creditor. Until the Court of Common Pleas, for some reason, make a final decision in the matter, the debtor is not bound to surrender himself into custody.

On *certiorari* to the Essex Pleas. In matter of insolvency.

The case was heard upon the following statement of facts, agreed on by the counsel of the parties respectively.

The said Joseph Doremus, as surviving partner of Peter and Thomas L. Doremus, obtained a judgment against the said John M. Bush, on the 5th day of March, 1860, in the court for the trial of small causes, before Jonas S. Crum, esq., a justice of the peace in and for said county, for the sum of ninety dollars and ninety-five cents, including costs; and an execution on said judgment against the body of said Bush was issued out of said court, on the 8th of the same month, by virtue of which said Bush was arrested by a constable, and gave bond to apply for the benefit of the insolvent laws of New Jersey, according to the statute entitled "an act abolishing imprisonment on civil process in certain cases." He accordingly applied to the Court of Common Pleas of said county, who appointed the 26th day of June last as the time for hearing said application, at which said time the said Bush, and the said Doremus, as opposing creditor, appeared before the court. The said Bush was examined, and the court being about to discharge him, the said Doremus filed his undertaking according to the eighth section of the act entitled "an act for the relief of persons imprisoned on civil process." Whereupon the said Bush, although he had not obtained his discharge, went at large, without surrendering himself to the sheriff or keeper of the jail of said county, nor giving to the said sheriff or keeper the bond mentioned in the act of 24th of February, 1850, entitled "a further

Doremus v. Bush.

supplement to the act entitled an act for the relief of persons imprisoned on civil process," approved April 16th, 1846.

The said Bush nevertheless filed his declaration and replication to the plea of the said Doremus (*pro ut* the same), and the cause came on for trial, November 1st, 1860, before the Common Pleas aforesaid. Before the jury were empaneled, the counsel of said Doremus moved the court to quash all further proceedings, upon the ground that the court had no jurisdiction in the premises, by reason of said Bush being at large as aforesaid, by which his bond, given to the constable as aforesaid, had become forfeited. After argument, the court overruled the objection, and ordered on the trial, and such proceedings were subsequently had, that said Bush was discharged by verdict and judgment of the said court thereupon.

The main reason relied on for the reversal of the judgment was that the Court of Common Pleas could not legally try the case, or give judgment of discharge thereon, because the said Bush was not in actual custody.

For the plaintiff in *certiorari*, *W. K. McDonald*.

For the defendant, *L. C. Grover*.

VREDENBURGH, J. Bush was arrested by virtue of an execution against his body, issued, at the suit of Doremus, out of the court for the trial of small causes, and gave bond to apply for the benefit of the insolvent laws, under the "act abolishing imprisonment on civil process in certain cases." *Nix Dig.* 331, § 9.* The Common Pleas appointed the 20th June, 1860, for his hearing, when, upon his examination, the court being about to discharge him, Doremus filed his undertaking, under the eighth section of the act for the relief of persons imprisoned on civil process (*Nix Dig.* 352, § 8),† whereupon Bush went at large, although he had not obtained his discharge, neither surrendering himself to the sheriff, nor giving any bond under the act of the 24th February,

* *Rev.*, p. 497, § 2. † *Rev.*, p. 500, § 13.

Doremus v. Bush.

1858. *Nix Dig.* 384.* Bush, however, went on and filed his declaration, upon which issue was joined. In November, 1860, the cause was tried before a jury. Before, however, the jury were empaneled, Doremus moved the court to quash all further proceedings, on the ground that the court had no jurisdiction, by reason of Bush being at large. The question is, had the Pleas of Essex jurisdiction of the case at the time it came on for trial before the jury?

At the common law, when a man was arrested for debt, he stayed in prison until he paid either the debt of the plaintiff or the debt of nature. The act of 1795, revised in 1846, (*Nix. Dig.* 351) allowed a debtor in actual confinement to apply to be discharged by the Common Pleas. Under this act, the court obtained jurisdiction by virtue of the *imprisonment*. The act of April 15th, 1846, (*Nix. Dig.* 331)† to a certain extent abolished imprisonment for debt. Its first section prescribes that any person held in custody by any officer in any civil action shall be *discharged* from custody by such officer. As a matter of course, this took away from the Common Pleas all jurisdiction over such debtor as a person in custody. The debtor was discharged from custody by the express provisions of the act. This discharge, it is true, was upon certain conditions; but those conditions being complied with, the discharge from custody was none the less complete. Unless, therefore, the Pleas get jurisdiction in some way, *otherwise* than by means of the applicant being in custody, their whole jurisdiction over the matter was gone, and the execution against the debtor was a nullity as regards the creditor. The Pleas, however, did get jurisdiction over a debtor at large under this act by reason of the following provisions of the act, *viz.* that the discharge from custody should be upon the condition that the debtor shall give bond to the officer conditioned for the appearance of the debtor at the next Court of Common Pleas, and petition said court for the benefit of the insolvent laws, and would comply in all things therewith, and would appear in person

**Rev.*, p. 500, § 13. †*Rev.*, p. 857, § 58.

Doremus v. Bush.

at every subsequent court until he shall be discharged as an insolvent debtor; and if refused a discharge, shall surrender himself immediately thereafter to the keeper of the jail, there to remain until discharged by due course of law. And by the said act it was further provided, that such debtor shall be entitled to make application for his discharge under the insolvent laws at the next or any subsequent term after such arrest, as effectually as if actually confined in jail. This gave complete power to the Pleas to hear and discharge a debtor who *had been* in custody, but who was not in custody when he made his application for discharge.

The Pleas thus having obtained jurisdiction of the subject matter, the next question is, how long do they retain it? The necessary inference is, until the final determination of the cause—until he is either granted his discharge or refused it.

In the case before us, the debtor did make his application according to law to be discharged, and at his instance, a special day was set down for his hearing before the Pleas. At such hearing the court were satisfied with the examination of the debtor, but the creditors were not. The court were about to discharge him, when the creditors entered into the stipulations required in such case by the eighth section of the act (*Nix Dig.* 378),* whereupon the court remanded the said debtor to prison. The debtor did not, however, notwithstanding such remanding, surrender himself into custody, but remaining at large, went on filing his declaration under the insolvent laws, upon which the usual issue was joined and trial had, when the jury found for the debtor, and the Pleas discharged him. The plaintiff in *certiorari* contends that this discharge by the Pleas was illegal, because the debtor was not in actual custody at the trial before the jury. He contends that when the creditors filed their stipulation the debtor should have gone immediately into custody. In this I think the plaintiff is under a misapprehension. By filing the stipulation, the creditors had put it out of the power of the court to pass a final decree. Before any final

* *Rev.*, p. 500, § 13.

Doremus v. Bush.

decree by the court could be made, the creditors appealed from the court to the jury.

The stipulation by creditors, in legal effect, was to continue the cause, not to settle it. It was merely laid over to be tried by a jury. The order remanding the debtor to prison was a nullity. It was an order which the Pleas had no power to make. In this regard the power of the court was regulated by the act abolishing imprisonment in certain cases, and not by the act for the relief of persons imprisoned.

This is further manifest by the condition of the debtor's bond, given to the officer on his discharge. The condition is, that he will appear at every subsequent court until discharged, and if refused a discharge, surrender. He is bound to surrender only upon a refusal of the court to discharge. Now this refusal to discharge cannot happen when the court are willing to discharge, and are only hindered from doing so by the creditors entering into the stipulation. The forfeiture of the bond for a refusal to discharge can only happen by the final decree of the court. This may happen at the special hearing if the court are not satisfied, and they refuse on that account to discharge, or it may happen when the court make a final decree of refusal upon the verdict of the jury. But until the court, for some reason, make a final decree in the matter, the debtor is not bound to surrender himself into custody. What is meant in the bond by the term refusal to discharge, is defined in the statute itself (*Nix. Dig.* 380, § 10,)* which provides, that if it shall appear to the court, or by the verdict of a jury, that the debtor has concealed any property with intent to defraud, the said debtor shall be refused his discharge, and the said court shall remand him to prison. Now this tenth section was originally enacted long before the act authorizing the bond, and it is apparent that the language of the bond was intended to refer expressly to this tenth section. The refusal mentioned in the condition of the bond is the refusal spoken of, in this tenth section. It is manifest, therefore, that the bond was not intended to be forfeited when the debtor surrendered himself into cus-

*Rev., p. 501 § 15.

Doremus v. Bush.

tody, nor that the Pleas be ousted of jurisdiction by the creditor's stipulation, and the debtor then declining to go to jail. These consequences did not follow until the court had made a final decree of refusal to discharge *for fraud* in the debtor. This has, as far as I understand, been the universal practice in this state. I have never known an instance of a debtor going to jail merely because of the stipulation. Why, if this be so, we should still have our common jails crowded with insolvent debtors. The creditors would always stipulate, and the debtor would have to go into jail immediately, and remain there in *arcta et salva custodia* without the possibility of release until all the law's delays were satisfied.

If such had been ever deemed to be the law, it could not, I apprehend, have been left for the legislature of 1858 to make the discovery. But the plaintiff in *certiorari* contends that it is apparent that the debtor, upon the stipulation being filed, is bound to go to jail, from the provisions of the act of February 24th, 1858, 3 *Nix. Dig.* 384, § 1.* This provides that any debtor who shall be remanded to prison under the eighth section of the act of 1795 is authorized to give the jailor a bond to the creditors, conditioned that such debtor shall, in all things remaining, comply with the requirements of the insolvent laws, and shall appear before the court according to law, and if refused a discharge, surrender himself immediately to the jailor, &c. Under this act, the plaintiff in *certiorari* contends that, upon the creditor stipulating under this eighth section, the debtor must go to jail, and there stay until the litigation is got through with. And it is asked, by the plaintiff in *certiorari*, if this is not the office of the act of 1858, what is it? I answer, its office is not to lock up the insolvent debtor, but to discharge him. It is in furtherance, and not in restriction of the wise and benevolent policy of modern legislation, which is to punish not the honest, but only the *fraudulent* debtor. Before the act of 1858 was passed, if the debtor was so unfortunate as not to have been able to give bond before he made his application or before the special hearing, and he was then remanded by

* *Rev.*, p. 500 § 13.

Doremus v. Bush.

the creditor's stipulation, he could not be discharged from custody at all, as the previous acts did not meet such cases, and he had to lie in jail until the final decree upon the verdict of the jury. It was to meet such cases that the act of 1858 was passed; so that now the debtor, until he is adjudged to have acted fraudulently, can be discharged from arrest upon giving bond that he will try the question of fraud, at any and all stages of the proceedings, until a final decree of fraud is made against him. I am of opinion that there was no error in the Court of Common Pleas of Essex, and that the judgment should be affirmed.

BROWN, J. The *certiorari* in this case brings up the proceedings of the Essex Common Pleas upon the application of John M. Bush for the benefit of the insolvent laws. He was arrested, gave bond under the "act abolishing imprisonment on civil process in certain cases," passed April 15th, 1846,* applied and had his hearing on a day appointed, and proved to the satisfaction of the court that he had complied with the requirements of the insolvent laws. The court being about to order his discharge, pursuant to the sixth section of the act for the relief of persons imprisoned on civil process, the plaintiff filed an undertaking according to the eighth section of the same act, so that he was not discharged. The debtor filed his declaration against his creditors, and the plaintiff his plea, and on the 1st of November, 1860, the cause came on for trial. Before the jury were empaneled, the plaintiff moved to quash the proceedings, upon the ground that the court had no jurisdiction, because the debtor was not, and had not been in confinement as an insolvent debtor, he having continued at large when the undertaking was filed. But one question is presented by the case, and that is whether a debtor under bond, usually called an insolvent bond, must surrender, and be placed in close confinement before the filing of an undertaking by a creditor. The answer to this question depends upon the proper construction of the acts above referred to. The act abolish-

*Rev., p. 497.

Doremus v. Bush.

ing imprisonment in certain cases, which authorizes a person arrested upon civil process to give bond to the officer making the arrest, was passed in 1830, subsequent to the original act for the relief of persons imprisoned upon civil process. The two acts must be construed together, and where they conflict the later enactment abrogates the former.

The last act is entitled "an act abolishing imprisonment on civil process in certain cases." The first section provides that it shall not be lawful to arrest or imprison the person of any female in any civil action. The second, that any person who may be arrested or held in custody, by any sheriff, constable, or other officer, in any civil action upon mesne process or process of execution, or upon an attachment for not performing an award, or who may surrender in discharge of bail, shall be discharged from arrest or custody by such officer, upon giving, under oath, an inventory of his property and a bond to the plaintiff in the action, with condition that he will appear before the next Court of Common Pleas, and petition the court for the benefit of the insolvent laws of this state, and comply with the requirements of said insolvent laws, and appear in person at every subsequent court until he shall be discharged as an insolvent debtor, and if refused a discharge, surrender himself immediately thereafter to the keeper of the common jail, there to remain until discharged by due course of law. The third section provides that any person arrested, and having given bond as aforesaid, shall be entitled to make application for discharge under the insolvent laws of this state, at the next or any subsequent term after such arrest, as fully and effectually as if he or they were actually confined in the common jail of the county.

The defendant, having given bond, enjoys the immunity of this statute until he is refused his discharge or forfeits his bond. The refusal to discharge, within the meaning of the second section, must be on the merits, not such refusal as will allow of a new application nor such as continues the same application without deciding the merits. The suspend-

Howeth v. Jersey City.

ing the power of the court to discharge, by the creditor filing an undertaking, is not refusal to discharge; failure to surrender in such case does not forfeit the bond. The same issue yet undetermined is to be tried by jury, &c., and the parties are continued in court for the purpose of the new trial. Judgment is not yet pronounced. If the defendant is in actual confinement, he is remanded for the purpose of holding him until the trial. If he has given bond, he has still the right to be at large, so that he continues to apply by filing his declaration and proceeding according to law. He is still an applicant for the benefit of the insolvent laws. He says, in his declaration, that he has complied with the act in all things, and is entitled to his discharge. The creditor denies this by his plea, and upon this issue the trial of the application proceeds to verdict. Pursuant to the verdict, he is either discharged or refused. If refused, his bond requires surrender; he must surrender, or it is forfeited. The court have no right, at any time, to order him in confinement.

Judgment of the Common Pleas affirmed.

CITED in *State, ex rel. Ricardo, v. Common Pleas of Passaic*, 9 Vroom 183.

THE STATE, JOHN HOWETH ET AL., PROSECUTORS, AND THE
MAYOR AND COMMON COUNCIL OF JERSEY CITY.

Under the charter of Jersey City, only such resolutions and ordinances of the common council as are in their nature final need be presented to the mayor for approval; when a final ordinance provides for a different improvement from that asked for in the petition presented to the council, and specified in the public notice given according to the charter, it will be set aside and held void as against the prosecutors.

The *certiorari* was brought to set aside an assessment made by the common council of Jersey City for paving and otherwise improving Bright street.

The principal reasons urged are—*first*, that the resolution of council appointing a time for hearing objections to the improvement had not been presented to the mayor for his

Howeth v. Jersey City.

approval; and *second*, that the ordinance of council was variant from the petition and notice required by the charter, and therefore unlawful and void.

For the prosecutors, *J. Flemming*.

For the defendant, *R. D. McClelland*.

The opinion of the court was delivered by

VREDENBURGH, J. The first reason assigned for setting aside this assessment is, that the resolution appointing a time for the hearing of objections to the improvement of Bright street was not presented to the mayor for his approval. But it is apparent that this is not one of those kind of ordinances or resolutions intended by the charter to be presented to the mayor. It is only the final resolution ordering the improvement to be made that could be so intended.

The language of the charter, *Pamphlet Laws of 1851*, page 402, § 26, is, every ordinance or resolution, before it goes into effect, shall be presented to the mayor. These intermediate proceedings cannot be said to go into effect. It is only the final law, as passed, that can be said to go into effect.

It might as well be said that each intermediate step of the legislature in passing a law shall be presented to the governor for his approval or veto. This is further manifested by the provision, in the same section, that if the ordinance, after its veto is passed by two-thirds of the council it shall take effect as a law, and if not returned by the mayor, it shall become a law.

The next reason for reversal is because the ordinance provides for a different improvement from that asked for in the petition and specified in the notice. The petition was to grade, pave, gutter, and flag Bright street, from Grove to Jersey street, where not already done. Bright street had been opened and used as a street sixty feet wide some years

Howeth v. Jersey City.

before this application. Buildings had been put up on the south side as if it were only a sixty feet street; the owners had bought and sold upon that assumption. It was practically but a sixty feet street.

The petition to pave Grove street was presented to the council on the 21st June, 1859. The advertisement required by the charter was to the same purpose. The original ordinance, as reported to the council, was to the same effect. The hearing was had on the 30th July, 1859, and the improvement recommended by committee of council.

On the 20th September, 1859, the ordinance was taken up and rejected, but afterwards, at the same meeting, again taken up and reconsidered, and laid upon the table.

At an adjourned meeting, on the 27th September, 1859, the original ordinance was altered by inserting, after the words Bright street, where they occur, the words "at lawful width of eighty feet," so as to read, an ordinance for filling in Bright street at the lawful width of eighty feet, and passed; and this assessment is made for paving Bright street at the width of eighty feet. Now neither the return to the *certiorari* nor the proof shows that Bright street was eighty feet wide, but the proof is direct and positive that it was only sixty feet wide.

These facts are clearly fatal to this assessment. In the first place, it was taking this twenty feet from the prosecutors without compensation; and in the second place, having taken it for nothing, the city forces the owner to pay for its improvement for the city's use. In the next place, it was not the improvement advertised. In the next place, this alteration was made after the parties interested had been heard upon the original application, and without any opportunity of being heard before the council. In the next place, the proceedings ought to have been to alter and widen as well as to pave, so that the width of the land taken could have been assessed. If this proceeding could be justified, the city authorities, under a proceeding to pave a street with houses built up on both sides, could simply, by calling a street one hundred feet wide, instead of sixty, its actual width,

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Howeth v. Jersey City.

without notice, or rather under a false notice, and without paying a cent to the owners, level the whole street even with the ground, and make its owners pay for their own ruin.

I presume this action of the city authorities has been induced by the result of the suit of *Holmes v. Jersey City*, 1 *Beasley* 301. But that case only decided that, as between Jersey City and Mr. Holmes, the city could not set up that it was a street only sixty feet wide; but it did not decide that, as between the city and these prosecutors, it was a street eighty feet wide. The Court of Appeals, in that case, did not decide that the street was a street eighty feet wide, but only that the city could not set up that the action of the surveyors of highways did make it a sixty feet street: they only decided that it was not a street either eighty or sixty feet wide, and therefore the authorities of Jersey City showed no right to intermeddle with it. Van Vorst, in 1835, had dedicated the street as an eighty feet street, but it was only upon paper. It had never been accepted by the township, and, being thus only a paper road, the authorities of Jersey City had surveyors appointed to alter it to a sixty feet street, and the Court of Appeals said the surveyors of the highways could not alter what had never existed, and so they restrained the city from proceeding with the action of the surveyors of the highways as valid, and left Mr. Holmes to his private rights as a lot owner, binding upon land dedicated to the purposes of a street. But this part of Bright street had been actually opened and recorded by the city, and paved and built upon, and was *de facto* a street sixty feet wide years before this application to pave, and they had no authority to widen it then without taking proceedings to alter it from a sixty to an eighty feet street, and do so by merely declaring that its rightful width was eighty feet. This view of the case makes it unnecessary to look into the other reasons urged. This assessment, as regards the prosecutors, must be set aside, as founded upon an ordinance void as against them.

Assessment set aside.

Janeway v. Skerritt.

GEORGE R. JANEWAY v. JOSEPH SKERRITT.

1. When, upon the trial day, the defendant moves to nonsuit the plaintiff because the costs of two former suits for the same cause of action have not been paid, and the defendant offers to pay the costs forthwith, and the defendant is not prepared with his bills of costs or to show the amount of costs due, he is not entitled to a judgment of nonsuit.
2. The statement of counsel in a justice's court, made several months after the trial, and when he had ceased to represent his client, cannot bind the client.

On *certiorari* to a justice of the peace of the county of Hudson.

For the plaintiff, *C. H. Winfield*.

For the defendant, ——— ———.

The opinion of the court was delivered by

BROWN, J. This case was submitted on written briefs. It appears that, upon the day to which the trial of this cause was adjourned, the defendant below moved to nonsuit the plaintiff, upon the ground that the costs of two former suits for the same cause of action had not been paid. The justice refused to nonsuit for this cause. In answer to a rule of this court, the justice certifies that the defendant moved for a nonsuit, and not for a stay of proceedings; that there was no certified copy of costs of former suit presented in court, and that the counsel for the plaintiff below sent out for gold in exchange for bills, held it in his hands, and asked counsel for the defendant below to produce his bill of costs, and that he was ready to pay it: and further, that there was no demand for any certain amount made by counsel of defendant below. If the matters stated in this certificate are true, the defendant was not entitled to judgment of nonsuit. If Skerritt was ready to pay the costs due Janeway, when notified of the amount, and payment demanded, no more could be

Coulter v. Kaighn.

required of him. If Janeway, or his counsel, on being informed that Skerritt was ready to pay, did not inform him what amount he required, the fault lay with him, Janeway. But the plaintiff here insists that the statements of the justice are not true, and he relies upon a letter from Mr. Jelliffe, the counsel of Skerritt in the court below, to prove it. This letter is dated March 12th, 1862, several months after the *certiorari* was returned, and after Mr. Jelliffe ceased to represent Skerritt in this case. Mr. Jelliffe could not then bind his former client by any statement or admission. The letter can only be considered as the declaration of an agent after his agency has ceased. It is not legal evidence. The plaintiff here must therefore fail, because the reason assigned for the reversal of the judgment is not sustained in fact.

Judgment affirmed.

STEPHEN COULTER v. CHARLES KAIGHN AND JAMES M. COOPER.

Upon an application to cancel a judgment in this court, on the ground that certain bonds, to which the defendants alleged the judgment was collateral, had been paid and satisfied by the acceptance of other bonds of a like amount, the court will not interfere where it appears that the original bonds were collateral to the judgment, and that the new bonds were, by agreement, substitutions for those first given. By such agreement, the defendants are estopped from denying that the judgment was merely collateral.

This case came before the court on a motion to order satisfaction entered of a certain judgment confessed by the defendants to the plaintiff, on the 19th of May, 1858, for the sum of \$19,996.58, which the defendants alleged was collateral security for the payment of certain bonds which had been given by the defendants to the plaintiff, and which bonds had been satisfied and paid.

The facts, as presented by the parties, are fully given in the opinion of the court.

Coulter v. Kaighn.

For the motion, *P. L. Voorhees* and *A. Browning*.

VREDENBURGH, J. The plaintiff, on the 19th May, 1858, entered up judgment in this court against the defendants for \$19,996.58 by confession on bond and warrant of attorney. The defendants now move to enter satisfaction on the ground that the judgment has been paid. The bond on which the judgment was entered is dated on the 23d April, 1856. It appears, by the evidence, that at the date of the bond and warrant the plaintiff had judgment against the defendants and the South Camden Ferry Company for \$9902.57.

The defendants were directors of the company, and applied to the plaintiff to cancel the last named judgment. The plaintiff agreed to it, provided the defendants would give him their individual bond and warrant of attorney to confess this judgment, being the one now in controversy, in lieu of their previous judgment, and also twenty-four bonds, of \$500 each, secured by a mortgage on the property of the ferry company, known as the second mortgage. This was done.

These twenty-four bonds have since been taken up by the ferry company, and twenty-four other bonds, of \$500 each, secured by a subsequent mortgage of the ferry company, accepted by the plaintiff in lieu of them, and the question is, if upon these facts we should order the judgment on the bond and warrant to be cancelled. The defendants contend that the ferry company was the principal debtor, and that the judgment bond was only given as collateral to the first named twenty-four bonds, and that these bonds, being paid and satisfied by the second named twenty-four bonds, the judgment bond was paid.

The plaintiff contends—first, that the second twenty-four bonds were substituted, by agreement, for the first named twenty-four bonds to accommodate the defendants, and that there was no payment; and, secondly, that even if there was no agreement to substitute the second twenty-four bonds for the first ones, yet that the first twenty-four bonds were col-

Coulter v. Kaighn.

lateral to the judgment bond, and not the judgment bond collateral to the first twenty-four bonds.

Upon both or either of these questions I cannot see how there can be any doubt or hesitation, as both parties have furnished the evidence in writing.

The transaction, as it took place on the 6th June, 1861, when the first twenty-four bonds were surrendered, and the second set taken, was reduced to writing and signed by all the parties interested, by the defendants as well as by the plaintiff, and we have it here as Exhibit C on part of plaintiff.

This agreement, among other things, recites, that whereas the property of the South Camden Ferry Company is about to be sold, and whereas Stephen Coulter and others are the owners of all the bonds issued upon the second mortgage, the said Coulter being the holder of those held by him as *collateral security for a certain debt or debts*; and whereas the said Coulter and others are willing to offer to the owners of the third mortgage an opportunity to protect themselves, now therefore we do hereby covenant with the holders of the third mortgage, that they, the holders of the third mortgage, as our trustees, may bid to the amount of the second mortgage, and if struck off to them, shall pay us all interest on the second mortgage, and costs and fees, &c., and pay off the first mortgage, that then the sheriff may make the deed to them, provided they shall make bonds to the said Coulter and others for the principal amounts of the said second mortgage bonds, that is to the said Coulter for \$12,000, and also execute a new mortgage to secure said last mentioned bonds. The defendants were by at this arrangement, and signed under this agreement their assent in writing, as follows: We, James M. Cooper, Charles Kaighn, Knight and James Tutuill, having an interest in the bonds held by Stephen Coulter as collateral, and the debts secured thereby, do consent to the above agreement. This agreement, on all sides, has been fully carried out. The sale went on under it, the third mortgagees purchased, paid the interest in arrears and expenses, the plaintiff surrendered up his first twenty-

Coulter v. Kaighn.

four bonds and took the second twenty-four bonds secured by a new mortgage of the purchaser; and all this was done with the knowledge, consent, and co-operation of the defendants.

Now, even supposing that the judgment in controversy was only collateral to the first twenty-four bonds, yet the legal effect of this agreement was to substitute, by an agreement, the second twenty-four bonds in their place, and for which the collateral still remained a security by the agreement of the parties. The substitution was no payment of the first twenty-four bonds, nor of the indebtedness they were intended to secure. We can give no other legal effect to the agreement of the 6th June, 1861. The object of the defendants' agreement of the 6th June, 1861, could only be to negative the conclusion, that the substitution of the new bonds for the old ones should operate to discharge any collaterals. But again, if this is not the legal effect of the agreement of the 6th June, 1861, it is conclusive proof that the defendants are estopped from denying that the first twenty-four bonds were collateral to the judgment in controversy, and not the judgment to the bonds.

In the first place, the agreement of the 6th June expressly says that the twenty-four bonds are collateral security for the plaintiff's debt; and in the second place, their own written agreement, signed by them, says that the bonds are held by the plaintiff as collaterals, and they further say they are interested in these bonds. Now if the bonds were the principal debt, and the judgment in controversy only collateral, how were the defendants interested in the bonds? They could not be, for they must have belonged absolutely to the plaintiff. The defendants could only be interested in the bonds upon the supposition that they were collateral to the judgment now sought to be cancelled; and then they would be interested; for if the judgment should be cancelled from other sources, the bonds would revert again to them. It is not necessary to pursue the question further, for even if the judgment was collateral to the bonds, the defendants are estopped from denying it by their own admission in writing

State v. Williams.

to the contrary when the arrangement of the 6th June, 1861, was entered into, and their standing by and receiving the first twenty-four bonds cancelled under such their agreement. But even without this agreement of June 6th, 1861, it is apparent that the judgment was not collateral to the twenty-four bonds or to anything else.

The original loan to the ferry company was upon the credit of the defendants. It was on notes endorsed by them, and when the first twenty-four bonds were taken, judgment on their endorsed notes had been entered up against them, and at their request that judgment was cancelled upon their engagement to give this judgment bond, which was done accordingly, and also these twenty-four bonds given. Under these circumstances, the judgment bond was no more collateral to the twenty-four bonds than the twenty-four bonds were to the judgment. Both represented an original indebtedness, and although payment of one was payment of both, yet a mere change of security of either was no payment or satisfaction of the other. It is true the plaintiff, on entering judgment on his bond and warrant of attorney, swears that the judgment bond was collateral. But the defendants have also, in their written agreement, said the twenty-four bonds were collateral. Both sides intend to tell the facts truly, but both draw an erroneous conclusion of law from the same facts, perhaps each against himself.

The motion to enter satisfaction is denied with costs.

THE STATE v. GEORGE WILLIAMS.

1. Any place of public resort, in which illegal practices are habitually carried on, or when it becomes the habitual resort of thieves, drunkards, prostitutes, or other idle, vicious, and disorderly persons, who gather together there for the purpose of gratifying their own depraved appetites, or to make it a rendezvous where plans may be concocted for depredations upon society, and to disturb either its peace or its rights of property, is a public nuisance.

State v. Williams.

2. No private individual has a right, for his own amusement or gain, to carry on a public business clearly injurious to and destructive of the public quiet, health, or morals, and is indictable for so doing, because the injury is of a public character to the public, and not merely private to a single individual.
3. Violence and noise are not necessary constituents of a disorderly house ; it is sufficient to show, under the general allegations, a house ill governed and disorderly, in the sense stated, to warrant a conviction.
4. Any person who keeps, or causes to be kept, for his own profit or amusement, or for any other cause, such a place of resort, or rents any building to any person knowing that the same will be so kept, is guilty of an indictable misdemeanor.
5. To justify a conviction of a landlord, who rents to a tenant a place kept as a disorderly house, the evidence should clearly show that, at the time of leasing, the landlord knew the purposes for which, or the mode in which the house was to be kept.
6. The mere power of the landlord to expel his tenant, by summary proceedings, for nonpayment of rent according to the terms of the letting, although connected with the failure to avail himself of it when the house has been disorderly, does not of itself make him responsible.
7. Mere nonfeasance on the part of the landlord cannot involve him in the guilt of the tenant ; but if he is active in advising the keeping of the house in a disorderly manner, or in aiding or assisting, or gives his consent and approbation to its being so kept, he becomes a participant in the act characterized by the criminal law as disorderly ; but his sanction and consent ought not to be inferred from the mere fact of his non-interference with the conduct of his tenant, without some other acts or declarations on his part giving a decided character to his sanction and consent.
8. The sale of liquor on the Sabbath day is unlawful, and a practice of so keeping a house as to violate the law *is to* make it disorderly.

On case certified for the advisory opinion of this court.

The defendant was indicted, in the Court of Oyer and Terminer in and for the county of Passaic, for keeping a disorderly house. The indictment was in the usual form. Upon the trial, the court charged the jury, among other things, that selling beer on Sunday constituted a disorderly house, if the jury believed that the defendant made it a practice to do so whenever he had customers.

To this part of the charge, and also to other parts (which are referred to in the opinion of the court) the defendant's

State v. Williams.

counsel objected; and the defendant having been found guilty, the advisory opinion of this court is requested as to the correctness of the charge.*

The case was argued by *A. B. Woodruff*, for the State, and *J. Hopper*, for the defendant.

CHIEF JUSTICE. Any place of public resort, whether an inn, a dwelling house, a storehouse, or any other building, or garden, is a public nuisance, in which illegal practices are habitually carried on, or when it becomes the habitual resort of thieves, drunkards, prostitutes, or other idle, vicious, and disorderly persons, who gather together there for the purpose of gratifying their own depraved appetites, or to make it a rendezvous where plans may be concocted for depredations upon society, and disturbing either its peace or its rights of property.

Such collections of persons can have no other effect than to debauch and deprave the public morals, although they may be quiet and orderly places, so far as mere noise and confusion is concerned; although the most scrupulous cleanliness may be observed, and they may be magnificent in ornament, and luxurious in their provisions for mere sensual gratifications, they are notable nuisances at common law, because they are *nocturni*, nuisances, that is, injurious to the public health, public quiet, or public morals.

No private individual has a right, for his own amusement or gain, to carry on a public business clearly injurious to and destructive of the public quiet, health, or morals, and is indictable for so doing, because the injury is of a public character to the public, and not merely private, or to a single individual.

It is a mistaken view of this crime to hold that violence or noise disturbing the neighborhood are necessary constituents

*The reporter regrets that he has not been able to procure a copy of the charge for insertion in the case.

State v. Williams.

of it. The indictments usually contain averments of whoring, gambling, tippling, fighting, cursing and swearing, as occurring habitually at the place; but these are merely descriptive averments, and need not all be proved. It is sufficient to show, under these general allegations, a house ill-governed and disorderly, in the sense stated, to warrant a conviction.

This is the rule to be extracted from the cases, some only of which will be referred to, among the many cited on the very able and interesting argument with which the court was favored by the learned prosecutor who argued this case before us. *Faulkner's case*, 1 *Saund.* 248; 2 *Chitty's Cr. Law* 673-4; *King v. Rogier*, 1 *B. & C.* 72; *King v. Taylor*, 3 *B. & C.* 502; *Tanner v. Trustees of Albion*, 5 *Hill* 121; *King v. Moore*, 3 *B. & Ad.* 184; *Bac. Abr., tit. Inns (A)*; *Russell on Crimes* 320-326.

Any person who keeps, or causes to be kept for his own profit or amusement, or for any other cause, such a place of resort as I have described, or rents any building to any person knowing that the same will be so kept, is also guilty of an indictable misdemeanor. In misdemeanors all are principals—the procurer, the accessory before the fact, and the aider and abettor.

To justify a conviction of a landlord who rents to a tenant a place kept as a disorderly house, the evidence should clearly show that, at the time of leasing, the landlord knew the purposes for which, or the mode in which the house was to be kept. The mere fact of his being landlord of a disorderly house, and receiving the rent of it earned by the keeper, is not enough. He should not be held as a participator in the crime of his tenant, merely because he does not remonstrate with or threaten him with expulsion if he does not control his house in accordance with the law.

In that respect the liability and duty of the landlord is no more than that of any other citizen; but if the landlord rents for a year, and the house during the year is, with the knowledge of the landlord, kept in a disorderly manner, so as to be indictable, and notwithstanding this knowledge he

State v. Williams.

rents to the same tenant for another year, this will, in most cases, be strong evidence to charge the landlord with procuring the house to be so kept.

But the mere power of the landlord to expel his tenant by summary proceedings for nonpayment of rent according to the terms of the letting, although connected with the failure to avail himself of it when the house has been disorderly, does not of itself make him responsible.

Mere nonfeasance on the part of the landlord cannot involve him in the guilt of the tenant ; but if he is active in advising the keeping of the house in a disorderly manner, or in aiding and assisting, or gives his consent and approbation to its being so kept, he becomes a participant in the acts characterized by the criminal law as disorderly.

But his sanction and consent ought not to be inferred from the mere fact of his non-interference with the conduct of his tenant, without some other acts or declarations on his part giving a decided character to his sanction and consent.

The position of the landlord of a tenant keeping a disorderly house, irrespective of the act of letting the house for the purpose of being so used, or keeping the tenant after his character and business become known, in no wise differs from that of a stranger. As to sanction and approval, that which would make a stranger liable would make him liable. *Com. v. Harrington*, 3 Pick. 28 ; *The People v. Erwin and Clark*, 4 Denio 129 ; 1 Hawk. P. C. Ch. 77.

The cases cited proceed on the ground that in misdemeanors all are principals, and that aiding in the commission of a misdemeanor, or counselling and procuring its commission, renders the aider guilty as a principal. In those two cases the lessee of a bawdy-house, and one who leased it for that purpose, were held both as keepers of it.

To apply these principles to the case before the court, the judge at the oyer charged the jury, that the habitual sale of rum on Sunday by the defendant made his house a nuisance, and the jury seem to have convicted the defendant upon this ground ; for when polled they said, at least some of them,

State v. Williams.

that they agreed to the verdict because of the instructions of the court just stated.

The defendant's counsel objected to the instructions mainly upon the ground, that such acts, unaccompanied with other circumstances, did not constitute the house disorderly; that if they did, the defendant might be punished twice for the same offence, as he was liable to indictment for each act of selling.

If the argument has any merit, it is rather specious than sound. We have already seen that a house where the law is habitually violated is, if a place of public resort, a nuisance.

The argument proves too much. If it were sound, no indictment for keeping a disorderly house could be maintained. The fighting, cursing, gambling, tippling, &c., said to be necessary to make a house a nuisance, are all, or most of them crimes, and punishable as such.

The offence of keeping a disorderly house or nuisance consists not in the fact that the keeper commits any of these crimes himself, but that he permits his house to be made a nuisance to the neighborhood by suffering the commission of these crimes there, whether by himself or others, is immaterial. Surely the fact that he himself engages in the commission of them does not render him less guilty, nor is the defendant punished for the same offence.

He may be punished for each violation of the liquor law, and also for keeping a resort for violators of the law, to the detriment of the public morals.

The same individuals may be punished for a riot and an assault and battery, or for an arson or murder committed during the riot by one of the rioters.

In directing the jury upon the subject of the responsibility of landlords for the houses kept by their lessees, I think the learned judge went too far. It is hardly fair to say that a landlord is liable, who does not remonstrate with his tenant about the disorder of his house. The judge says the question of fact is, whether the house has thus been kept by the

State v. Williams.

procurement or with the knowledge and connivance of the owner. If it has, he says the law condemns the acquiescence, and holds the owner responsible.

Again he says, if the owner or landlord uses or permits the property to be used without objection in a manner injurious to the public, whereby it becomes a nuisance, he must answer for it.

It would seem that the learned judge's language is fairly susceptible of the meaning, that if the owner who has leased a house for a year, and has, by the terms of his lease, no control over the tenant, fails to go to the tenant and object to his irregularities, he so far acquiesces in them as to make himself liable. If that is the meaning, I cannot agree to the doctrine.

Mere acquiescence of the owner, or failure to object when he has no power of controlling or removing the tenant, cannot make him liable. It may be otherwise where the landlord has a control, and he fails to exercise it, although that is carrying the doctrine of aiding and abetting to a great length.

Thinking, as I do, that the verdict was found upon the ground that the defendant was himself in this house, and a habitual violator of the law in a public manner, by the unlawful sale of beer on Sundays, I think there should be judgment on the verdict.

ELMER, J. Upon the trial of an indictment, in the usual form, for keeping a disorderly house, it was proved that the defendant had a counter in the room occupied by him, and beer barrels, and that he sold beer from the barrels every Sunday during the time charged, or whenever any one called for it. After the jury had consulted, they desired further instructions from the court, and asked, "does selling beer on Sundays constitute a disorderly house?" To this the court answered, "it does, if the jury believe that he made a practice to do so whenever he had customers." This charge

State v. Williams.

being objected to on behalf of the defendant, the opinion of this court is now requested as to its correctness.

That selling or offering to sell beer on Sunday is prohibited by the statute and indictable is not disputed. But it is insisted that each specific offence must be indicted under the statute, and that the practice of violating this law does not constitute a disorderly house, unless, besides the mere fact of selling, it shall appear that disturbances occur, or minors or other improper persons are allowed to frequent the house. The mere repetition of unlawful acts, it is urged, cannot create a nuisance, and that the effect of sustaining this charge will be that a person may be twice punished for the same offence.

A house to which people promiscuously resort for purposes injurious to the public morals or health, or convenience or safety, is a nuisance, and the keeper is liable to indictment for keeping a disorderly house. That bawdy and gaming houses, and houses of entertainment resorted to by prostitutes, thieves, and vagabonds are of this character cannot be doubted.

Gaming is not of itself indictable at common law, but the keeping of a common gaming house is. Such houses have for a long period been held by the courts to be necessarily injurious to public morals, and therefore indictable as nuisances. *Hawk. b, 1, c. 75, § 6.*

The legislation of this state, from an early period, has been directed to the object of preserving to its citizens a quiet day of rest and worship upon one day out of the seven, and now the sale of spirituous and fermented liquors on Sunday is absolutely prohibited, even to those licensed to keep an inn. Conduct, therefore, which may be allowable on other days, if permitted on Sunday, may make a house disorderly; because it is greatly to the benefit of all classes of the community, and especially of those earning their bread by daily labor, that it should be set apart for quiet repose and religious observances. I entirely concur in the opinion of Booth, C. J., *Hall v. The State*, 4 *Harr.* 145, that the keeper of an inn or tavern (and of course any other person) who conducts himself in such manner, either in the enter-

State v. Williams.

tainment of travellers or other persons, or in permitting improper assemblages in or about his house on Sunday as profanes the Lord's day, or violates public order and decorum, or shocks the religious sense or feelings of the neighborhood, is guilty of a nuisance at common law.

A shopkeeper or other person may sell spirituous liquor by any measure not less than a quart, but it is no part of his legitimate business to permit the purchasers to remain upon his premises while they drink it; and if he is in the habit of doing this, so as to allow intoxicated or otherwise disorderly persons or minors to remain on his premises, or to make his premises their place of resort, whereby they become intoxicated, he is a corruptor of the public morals, and endangers the peace of the community, and is obnoxious to punishment as the keeper of a disorderly house. The same effect may be produced, and the same consequences may follow from the practice of giving away intoxicating liquor. In these and similar cases it is not the illegal sale of liquor which constitutes the offence, but so keeping a house as to make it injurious to the community, and therefore a nuisance. But I think the court was correct in charging that a practice of so keeping a house as therein to violate the law makes it disorderly. It was held, I think in entire accordance with sound principle by the Court of Appeals of Kentucky, "that the habitual perpetration of the prohibited offences in a house kept for the purpose constitutes the house a public nuisance, as it tends in a greater degree to the spread of the evil which was intended to be prohibited." 6 *B. Mon.* 21; * 12 *B. Mon.* 2.† It is remarked by Bishop, in commenting on these cases, as it appears to me correctly, that a man who holds out inducements for people to congregate and together commit violations of a statute, not only lends the concurrence of his will to their wrongful acts, but also does what most powerfully tends to injure the public virtue; or if he thus draws people together, that in their presence he may himself infringe a law of his country, he accomplishes the same evil end. 2 *Bish. Crim. L.*, § 258.

* *Smith v. Commonwealth.* † *Commonwealth v. McGeorge.*

State v. Williams.

That the defendant may also be indicted for each specific act of selling is no answer to this charge. The offences are not the same. Nor is it universally true that a man cannot be twice punished for the same act. The same act may be part of two offences. A conspiracy to steal and the larceny itself may be indicted and punished separately. *Rex v. But-ton*, 11 *Adol. & Ell. N. S.* 929. And so may burglary and the act of stealing which shows the guilty intent. If the act is indivisible, as for instance altering and selling forged notes, there is but one offence. The unlawful selling of liquor, which may take place in or out of a house, is wholly distinct from the keeping of a house where the unlawful proceeding is habitual. The seller and the keeper of the house may be the same person or wholly different. The keepers of bawdy and gaming houses, if they themselves game unlawfully, or commit fornication or adultery, may be punished for each of those offences, and also for maintaining the nuisance. I am clearly of opinion that there was no error in this part of the charge.

It was also proven in this case that the defendant owned several contiguous houses, and himself occupied parts of one, and that the other houses, as well as part of that he himself occupied, were possessed by his tenants, and that some of the tenants had been guilty of fighting, quarrelling, and misbehaving in the yard and in the street in front of the houses, to the annoyance and disturbance of the neighbors.

The court submitted the question to the jury whether the facts in evidence made the defendant responsible for the misconduct of his tenants? This part of the charge was also excepted to, and our opinion is asked as to its correctness. Some of the expressions used, if unexplained by the context, seem to be doubtful, as for instance the remark, that the rent which the defendant receives or agrees for is sufficient to show the benefit he received from the manner in which the house has been maintained. If there would seem to be danger that the jury might understand this as intimating that the mere receipt of rent from the tenants was sufficient

Mechanics and Traders Bank v. Bridges and Boyle.

it would be erroneous. But it is very evident, I think, that this was not the case. The explicit language of the charge is, "the question of fact is, whether the house has been thus kept by the procurement or with the knowledge and concurrence of the owner."

That the letting of a house, with a knowledge that it is intended to be kept in a disorderly manner, will render the landlord indictable as a principal in keeping a disorderly house, was expressly and correctly decided in *The People v. Erwin*, 4 Denio 129. Such guilty knowledge, I think, may in general be fairly inferred from proof that the landlord, after he knew that his tenant was in the habit of so acting, renewed the lease, and made no real effort to restrain him. The continual receipt of rent, and a persistence in enlarging the term of a disorderly tenant, who earns the means of paying the rent by misconduct visible to the landlord, may amount to very satisfactory evidence that he did in fact procure and sanction the disorderly conduct. This was the substance of the charge. It is quite apparent, from the whole case, that the verdict of the jury was rightly founded, not on the misconduct of the tenants, but on the personal acts of the defendant. I am therefore of opinion that the Oyer and Terminer should be advised to deny a new trial.

HAINES, J., concurred.

The court below is advised to render judgment on the verdict.

CITED in *State v. Lovell*, 10 Vroom 464; *Cuff, Adm'r, v. Newark and New York R. R. Co.*, 8 Vroom 27.

THE MECHANICS AND TRADERS BANK OF JERSEY CITY v.
BRIDGES AND BOYLE, ASSESSORS, ETC.

ROGERS v. THE SAME.

1. Whether a general law repeals any of the provisions of a special charter, is a question of legislative intention. If the words of repeal are so strong as to admit of no doubt as to the intention to repeal they shall take effect.

Mechanics and Traders Bank v. Bridges and Boyle.

2. Under the tax law of 1862, a resident of Jersey City is liable to taxation for stocks in foreign corporations held by him.
3. The tax law of 1862 repeals so much of the charter of Jersey City, passed in 1851, as regulates the things and property made taxable, but does not repeal the mode of levying and collecting the tax by the officers appointed under the charter and its supplements.

On *certiorari*. In matter of taxation.

The assessments in the above stated cases, having been made under the act of March 28th, 1862, entitled "a further supplement to the act entitled an act concerning taxes," and not under the charter of the city and its supplements, were removed into this court, and sought to be set aside, on the ground that they were illegally made, and that the provisions of the charter in regard to matters of taxation, being special and local in their character, were not repealed by the general law of 1862.

For the plaintiffs, *A. O. Zabriskie* and *J. P. Bradley*.

For the defendants, *F. T. Frelinghuysen*, *Attorney General*.

CHIEF JUSTICE. These assessments have been made by the assessors under the act of March 28th, 1862, and not under the charter of the city and its supplements. *Laws of 1851, 409, act of 24th March, 1862.*

By the 44th section of the charter, the subjects of taxation are declared to be real estate and chattels, at their true, full, fair value; nothing else is taxable.

The taxes are to be assessed by two assessors, chosen by and acting throughout the whole city. They are jointly the assessors of each ward in the city.

By the supplement of March 24th, 1862, there is to be appointed by the common council a collector of revenue, whose duty it is to collect the city, county, and state taxes; the county and state taxes are to be paid over by him to the county collector, in like manner and under like penalties as

Mechanics and Traders Bank v. Bridges and Boyle.

township collectors are directed by law to pay. By the act of March 28th, 1862, being the state tax law, the subjects of taxation are entirely different, comprehending a large amount of personal estate not included in the term chattels, particularly specified in the 4th section of the act of 1854, (*Nix. Dig.* 801) from which, however, are to be excluded stocks of domestic corporations. Corporations, also, are to be taxed at the amount of their capital stock and accumulated surplus, after deducting the value of their lands in and out of the state, as in the act prescribed, besides other kinds of taxation not necessary now to be enumerated.

By the act of 1862, two separate sums are directed to be assessed: one, by the first section, of \$100,000, which that section apportions among the counties. The last clause declares that said tax shall be levied and collected in the manner directed by this act, and the act to which this is a supplement, that is the act of 1846. The second section levies a tax of \$450,000, the third apportions it among the counties, and the fifth declares that, for the purpose of raising the sums required to be raised by this act, and the sums required to be raised for county, city, township, or other public taxes, the persons and property *herein after* specified shall be assessed and taxed *as herein after provided*. That part of the act touching the mode of assessment is carelessly drawn. It could not have been the intention to assess the \$100,000 and the \$450,000 in different modes, and yet the first, if a literal construction be adopted, is to be levied according to the act of 1846, while the 5th section directs the sums required to be raised by this act, together with the other taxes, to be raised as in the act provided. This includes the \$100,000 as well as the \$450,000. If the last section referred to relates to the machinery of taxation, the officers who are to levy and collect the tax, as well as the rates and principles of taxation, it is inconsistent with the requirements of the first section. If a subsequent section of an act conflicts with a prior, it so far supplants it, because it is the last expression of the legislative will. That the

Mechanics and Traders Bank v. Bridges and Boyle.

5th section of the act of 1862 refers to the subjects of taxation cannot be doubted. The words as "herein after provided" are equivalent to "the mode herein after provided." The subsequent part of the act does not provide in detail a complete set of taxing officers and collectors of taxes. But by further defining and declaring the duties of such officers it recognizes them as already provided by law for the discharge of these duties, and in this sense provides a mode of assessment and collection.

But although this view of the case is plausible, and perhaps sound, I am not satisfied to put the decision of this part of the case upon such a critical exposition of the statute, but prefer to rest upon the view presently to be expressed.

It is insisted, by the plaintiffs in *certiorari*, that the charter of the city is not repealed where inconsistent with the provisions of the act, either as to the subjects of taxation or the mode of assessment and collection. The argument is, that the provisions of a special charter of a municipal corporation are not to be repealed by the mere general words of an act inconsistent with its provisions; that the design to interfere with and repeal the chartered right must expressly appear on the face of the act. In the case of *The State v. Minturn*, 3 Zab. 529, this court held that the repealing clause in the tax law of 1851, repealing all acts and parts of acts inconsistent with its provisions, did not repeal the clause in the charter of a private company exempting it from taxation, although the act declared that all lands within this state, whether owned by individuals or corporations, should be liable to taxation. The land taxed was the road of a railroad company.

The decision was put upon the ground that it could not have been the intention to take away the immunities of a private corporation by such general words.

In *The State v. Branin*, 3 Zab. 497, it was held that the charters of municipal corporations were delegations of portions of the sovereign power to the body corporate, not to be taken away by mere general words.

Mechanics and Traders Bank v. Bridges and Boyle.

In *Gregory's case*, 6 Co. 20, it was also held that a particular statute should not be repealed by one that was general. There is no rule of law forbidding the repeal of the provisions of a municipal charter, except by supplement to it.

Whether a general law repeals any of the provisions of a special charter, is a question of legislative intention. If the words of repeal are so strong as to admit of no doubt as to the intention to repeal, they shall take effect. The words of repeal here extend not only to general laws, but to all acts, whether *special* or *local*, or otherwise inconsistent with the provisions of the act. The charter of Jersey City is both special and local, and so far as it is inconsistent with the act is repealed. The act cannot be interpreted so as not to interfere with the provisions of city charters, or upon the idea that it was not intended to do so; for instance, the 22d section expressly regulates the fees of assessors and collectors in assessing and collecting city, ward, borough, county, and state taxes; other sections expressly mention ward officers, and define their duties.

The charter may be inconsistent with the act, either as to the mode in which the tax shall be assessed and collected, that is the mere machinery of taxation, or else in the subjects of taxation and the principle of assessing.

If the taxes are to be levied and collected in cities (Jersey City for example) in the manner described by the act of 1846, as the first section declares, it cannot be done; for the machinery, the officers to do it, as prescribed by that act, do not there exist; there are no assessors and collectors elected for a particular ward. In view of the great practical inconvenience that will follow a contrary decision, nullifying as it will (in all cities and boroughs which have peculiar officers and modes of proceedings) the tax, and rendering its collection impossible, I think we should hold *that* part of the first section of the act to apply only where no other machinery of taxation is provided; that it declares the general mode, in the absence of a particular mode provided for a particular

Mechanics and Traders Bank v. Bridges and Boyle.

city. The charter of Jersey City is not in that respect so inconsistent with the act of 1862 as to be repealed by it.

It could never have been the intention of the legislature to substitute for the carefully contrived machinery of taxation, specially provided for the cities of this state, the utterly inapplicable provisions of the act of 1846, framed with a view to the simple wants of the townships into which the agricultural part of the state is divided.

It is very clear, from the whole structure of the act, that its main design was to regulate the subjects and principles of taxation, not the machinery. It is true some of the sections give additional powers to well-known officers to make the discovery of taxable property more thorough. But that does not alter the general character of the act, as above stated. So far as these provisions are applicable to the mode of taxation adopted in cities, they must be used ; where they cannot be, for want of officers to which they can apply, the law must cease to operate in that respect.

My conclusion is, that the subjects of taxation and principles of assessment to be used in Jersey City, for their local as well as state taxes, are to be regulated by the act of 1862. As to this, I see no escape from the clear well weighed words of the 5th section of the act, that the taxes for county, city, township, and other public taxes are to be raised on the persons and property, as in the act provided ; but that the act did not change the officers constituting the machinery of taxation, as provided for townships by the act of 1846, or by the special charters of cities for them.

I am also of opinion, for the reasons stated in my opinion in the case of the *Newark City Bank and Wallen*,* decided at this term, that the Mechanics and Traders Bank is entitled to have the value of its real estate and the stocks of United States and New Jersey, held by it, deducted from the amount of its stock paid in, and that Mr. Rogers is liable to taxation for the stocks in foreign corporations held by him.

As to the main point argued in this case, I am of opinion that the act of March 28th, 1862, repeals so much of the

**Ante*, 13.

Mechanics and Traders Bank v. Bridges and Boyle.

charter of Jersey City, passed in 1851, as regulates the things and property made taxable, but does not repeal the mode of levying and collecting the tax by the officers appointed under the charter and its supplements.

ELMER, J. The important and difficult question in these cases is, how far the general tax law of 1862 repeals the provisions of the charter of Jersey City. The words of the repealing clause are peculiarly strong, and without doubt were made so for a purpose. They are, "all other acts and parts of acts, whether special or local or otherwise, inconsistent with the provisions of this act, be and the same are hereby repealed."

It is a sound principle of interpretation, always adhered to by this court, that general words of repeal will not be held to affect a special charter. But the power of the legislature to repeal or modify a municipal charter, so far as the questions now involved are concerned, has not been and cannot be disputed. Laws on general subjects, containing words repealing other acts inconsistent therewith, such words being in fact almost always mere surplusage, are seldom intended to affect special provisions on kindred subjects contained in charters; but when words of a specific nature and application are used, it becomes the question what such words mean, or in other words, what was the intention of the legislature; for that being ascertained, we have no choice but to give it effect.

The charter of Jersey City, *Acts of 1851*, 409, contains special provisions, that after deducting the poll-tax of two dollars, appropriated to public schools, the residue of the tax to be raised shall be assessed on the value of the real estate and chattels situate in the city, both of residents and non-residents.

These provisions are inconsistent with the 5th and subsequent sections of the act of 1862. They are parts of a special and local act, and are therefore in terms repealed. I cannot escape the conclusion that the new act meant to re-

Mechanics and Traders Bank v. Bridges and Boyle.

quire, and does require, the money "to be raised for county, city, township, or other public taxes," in all parts of the state, to be assessed upon real and personal property, as therein prescribed, in a uniform manner, and meant to repeal all special charters, so far as their provisions are inconsistent with that object. Could we see that manifest injustice would result from such a construction of the special words, I should hesitate to adopt it. But no injustice can be fairly predicated of a system of taxation bearing equally on all parts of the state, nor can I perceive that even material inconvenience must be the result. It is indeed highly probable that the mode of taxation prescribed in the charter of Jersey City is wiser and better than that prescribed by the new act, but this is a consideration which belongs exclusively to the legislature.

Much stress was laid by counsel on the great difficulty, if not impossibility, of assessing and collecting the taxes in Jersey City, and in many other parts of the state, if the local laws directing the time and manner of doing so are held to be repealed. The local acts, however, except perhaps in a few unimportant particulars, are not, as to these matters, inconsistent with this act of 1862. The repeal cannot be considered as extending to anything not plainly inconsistent. The closing words of the first section, which direct the tax therein mentioned to be levied and collected in the manner directed by this act and the act to which this is a supplement, would seem to exclude the modes of proceeding provided for in other acts. But the 5th section directs that all the sums required to be raised by the act, which of course include the particular sum mentioned in the first section, shall be assessed and taxed as therein after specified. The meaning of this last provision would seem to be, that the taxes are to be assessed and collected as by this act directed, so far as the direction extends, but in all other particulars the assessment and collection are to be in pursuance of the general or local laws before in force. If these two sections are in conflict, the last section must prevail.

The local laws therefore not plainly inconsistent with some

Tyler v. Lawson.

explicit provision of the act of 1862, are left in force, and govern the time and mode of assessing and collecting.

VREDENBURGH, J., concurred.

VAN DYKE, J., dissented.

Assessment confirmed.

CITED in *State v. Miller*, post 371; *State, Taintor, pros., v. Mayor and Council of Morristown*, 4 Vroom 61; *State, Gorum, pros., v. Mills, Receiver*, 5 Vroom 180; *State v. Commrs of R. R. Taxation*, 8 Vroom 230; *Trustees of Public Schools v. City of Trenton*, 3 Stew. 677.

JOHN TYLER v. CHARLES S. LAWSON, TREASURER OF
SALEM CITY.

In an action for a penalty for the violation of a city ordinance, which declares that it shall not be lawful for any person to burn tan in propelling machinery, or for any other purpose, to the annoyance and discomfort of any person or persons residing in his or their vicinity; and if he does, and shall not immediately desist, upon the request of any citizen annoyed thereby, or shall be guilty of any subsequent violation of such ordinance, he shall be liable to a fine, &c., it is necessary to allege in the state of demand, a burning after a request to desist and the names of the persons who were annoyed.

In debt. *Certiorari* to the mayor of Salem city.

For plaintiff, *A. Browning*.

For defendant, ———.

The opinion of the court was delivered by

VREDENBURGH, J. This was an action of debt, brought under a city ordinance by Lawson, as city treasurer, against Tyler, before the mayor, sitting as a court for the trial of small causes, to recover four penalties, of \$5 each, for burning tan for propelling machinery in the city of Salem. The cause was tried in the absence of the defendant, and judgment rendered for the plaintiff.

The charter (*Pamph. Laws* 1859, 112, § 8,) provides that it shall be lawful for the common council to pass ordinances

Tyler v. Lawson.

for *abating* or *removing* any nuisance in any street or wharf, on any lot or lots or enclosure or other place in said city, and such other by-laws and ordinances for the peace, good order, and prosperity of said city as they may deem expedient, and to enforce the observance of all such laws by exacting penalties by fine not exceeding fifty dollars.

On the 22d March, 1859, the common council passed an ordinance that it shall not be lawful for any person to burn tan in propelling machinery, or for any other purpose, to the annoyance and discomfort of any person or persons residing in his vicinity. And if he does, and shall not immediately desist upon the request of any citizen annoyed thereby, or shall be guilty of any subsequent violation of this ordinance, he shall be liable to a fine of five dollars for each offence, to be recovered in an action of debt, by the treasurer, for the use of the city.

One of the reasons assigned is, that the state of demand is illegal.

The state of demand avers that the council passed said ordinance (setting it out at length); that the defendant did burn tan on his lot, in the city of Salem, on the 13th, 17th, 18th, and 19th days of May, 1860, to the annoyance of certain persons (not naming them) residing in his vicinity, and did not and would not desist, although often requested so to do by certain citizens annoyed thereby (not naming them), and has been guilty of subsequent violations of the ordinances, by means whereof four penalties have been incurred.

There are several fatal defects in this state of demand. In the first place, the act made penal is burning after the request to stop. The acts charged are the burning first, and a request to desist afterwards.

There is no averment of any burning after the request to desist.

In the next place, no persons are named who were annoyed, nor are any named who made the request to desist. Now the defendant had a right to contest several matters under this ordinance, which he could not do unless the persons

Tyler v. Lawson.

annoyed were named. He had a right to show that the persons complaining were not annoyed; that no smell issued from his premises, or that if there did, it did not reach the complainants, or that it was not annoying to them, or that the persons complaining were not in his vicinity, or were without the limits of the corporation, or that no request had been made to him to desist.

How was it possible for him to prove any of these things, unless the names of the citizens annoyed, or some of them, were given?

A grand jury might as well indict a man for murder without saying *who* was dead. Without expressing any opinion upon the other questions argued, the judgment must be reversed.

Judgment reversed.

CITED in *Roberson v. City of Lambertville*, 9 Vroom 72.

CASES DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW JERSEY,
AT NOVEMBER TERM, 1862.

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DENNIS FARREL v. JAMES COLWELL AND MULFORD CAVALLIER.

1. If a constable seize goods as the property of A., upon execution against him, which were in fact the property of A. and B., and sell and deliver the entire property, B. may maintain trespass.
2. If the title of one partner to a moiety of partnership chattels be bad as against an execution creditor, and the title of the firm be good as to the other moiety, both partners may maintain a joint action in trespass against the officer seizing and selling the entire property.
3. If B. and C. sue in trespass for taking goods in which C. had no property, and B. owned one-half, and no notice is given of a misjoinder pursuant to the statute (*Nix. Dig.* 665, § 129,) B. is entitled to recover damages to half the value of the property.
4. If no question was made at the trial in regard to the amount of damages in case C. was not proved to be an owner, and the court was not asked to charge on the point, and it appears that damages to the full value were given, the judgment will not be reversed.
5. Damages for taking a horse may be what he was worth in the business in which he was employed by the plaintiffs.
6. An innocent purchaser of property, who has bought it in a fair *bona fide* manner at a fair price, cannot be deprived of it because the object of the seller was to defraud his creditors.—By ELMER, J.

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Error to Hudson Circuit Court.

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Farrel v. Colwell.

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This was an action of trespass, brought by Colwell and Cavalier, the plaintiffs below, against Farrel, for selling and delivering possession of a horse and harness claimed by them. The defendant below, Farrel, justified as constable under a judgment and execution against one Peter Cavalier. The horse and harness had formerly belonged to Peter Cavalier, and constituted a part of his stock in trade; he sold out this stock in trade, one half to Mulford Cavalier, his son, and the other half to Colwell, each buying separately, but carrying on their business as partners, and using the horse and harness as partnership property.

For the plaintiff in error, *S. B. Ransom*.

For the defendant in error, *C. H. Winfield*.

The opinion of the court was delivered by the

CHIEF JUSTICE. Farrel was a constable, and had an execution in favor of Randall and Morrell against one Peter Cavalier, upon which he sold and delivered possession of a horse and harness claimed by the plaintiffs, Colwell and Cavalier, as purchasers from Peter Cavalier. The latter had been engaged in the kindling wood business, and the horse and harness was a part of the stock in trade. He sold out this stock, one half to Mulford Cavalier, his son, and the other to Colwell; each bought separately, and they carried on the business ostensibly as partners. The plaintiffs in execution, creditors of Peter Cavalier, insisted, on the trial, that the sale of the goods to Mulford Cavalier was void under the statute of frauds, as intended to defeat creditors, and also that it was a mere pretence that Peter Cavalier was still the owner of the property. It was admitted that Colwell was a *bona fide* purchaser, and had good title to a moiety of the property.

Several reasons have been assigned for the reversal of the judgment, some of which it is not necessary to notice to determine the case.

## Farrel v. Colwell.

Among other things, the court charged the jury that if they should find that the sale of the half interest to Mulford was fraudulent in fact as to creditors, and that Peter's interest in the property was liable to execution against his father, yet if it appeared by the evidence that the defendant levied upon and took the entire interest in the horse and harness, and sold and delivered them as entireties to the purchaser, he was a trespasser, because he violated the lawful joint possession of both the plaintiffs in the property, and unlawfully deprived Colwell of his undivided interest in the chattels, and his possession thereof.

This charge is said to be erroneous, because upon an execution against one partner the officer may seize the partnership property, and sell the partner's interest in it to satisfy his undivided debt, and deliver possession to the purchaser without subjecting himself to the liabilities of a trespasser.

Without discussing this vexed question, and attempting to define to what extent an officer may go in executing a *fi. fa.* upon partnership property to satisfy the debt of a partner, it is sufficient to say that this case does not come within the reach of any of the decisions upon this point exempting the officer from liability.

In this case the officer sold the property as the sole property of Peter Cavalier, and delivered possession of it as such. The sale was not only in defiance of the right of Mulford Cavalier but of Colwell. There was a conversion of the *whole* chattels, not of the partner's interest. Having sold the whole, and professed to pass title to the whole to the purchaser, the officer is estopped in this suit from saying that he did not sell Colwell's interest. It would never do to permit an officer to sell the interest of all the partners, not as such, but ousting that interest by a sale of the chattels as the property of a third person, and when sued by those whose rights he had destroyed as far as he had the power, to turn them out of court by saying, I had a right to sell the rights of one of you to satisfy his individual debt.

It is no answer to say that the officer could sell only the



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Farrel v. Colwell.

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right of the defendant in execution ; that he could not change the property of the others. That is so in every trespass. The property is not changed by the trespass, unless the owner elects to consider it so changed, and to bring his action for damages instead of for the thing itself.

Nor is the objection, that in the contingency contemplated by the charge, of Mulford Cavalier's title being bad as against the execution, so far as it depended on the bill of sale, that the action could not be maintained by both against the officer, a sound objection.

The case was put to the jury without objection, upon the ground that there was a partnership between Mulford Cavalier and Colwell ; if that was so, although the title of the firm might have been bad to the half of the horse and harness conveyed by the bill of sale to Mulford Cavalier, yet it was conceded to be good to the other half by reason of the admitted *bona fides* of Colwell's purchase. The plaintiffs could maintain a joint action, because they held a joint interest, in any event, in the moiety of the horse and harness, even if the bill of sale of the other moiety was fraudulent as to creditors.

The question should not have been presented as a bar to the joint action of the plaintiffs, but as affecting the damages to be recovered in the contemplated contingency of the *mala fides* of the sale to Mulford Cavalier. In that event, if Colwell had notice of the fraud, Mulford Cavalier's moiety never passed to the firm, and they could not recover the whole value of the chattels sold ; nor could they recover, if Colwell was without notice of the fraud, more than the value of Mulford Cavalier's interest as partner in the chattels.

The question, what the proper measure of damages would be in that view of the case, does not seem to have been distinctly presented upon the trial. The jury were instructed, in the event of no fraud being made out, to render a verdict for the whole value of the horse and harness, at the time they were taken, to the owners in their business ; but although they were instructed that if the fraud alleged were

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Farrel v. Colwell.

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made out, yet the plaintiffs might recover because of the unlawful disturbance of the plaintiffs' joint possession, and the deprivation by Colwell of his undivided interest in the property; yet they were not told to give in that case only the value of Colwell's interest. The only exception touching the measure of damages, was to that part of the charge in which the court held as to damages, what has already been stated. The omission of the court to charge further upon the measure of damages was manifestly an inadvertence, which would have promptly been corrected if brought to its notice at the time. The defendant neglected to do so. Not having made the point at the trial, he cannot have the advantage of it here. The rule upon this subject has long been well understood and settled. If the verdict was no larger in consequence of this omission of the court, the remedy, if anywhere, was in the court below on application for a new trial.

It was insisted, as a reason for reversal, that the measure of damages, as propounded to the jury, was incorrect; that it should not have been the value of the horse and harness to the owners in their business, but their absolute market value.

This was not a case for vindictive damages; the defendant was an officer serving an execution for a plaintiff who, so far as appears, was honestly asserting what he believed to be his rights; but notwithstanding, the defendants were entitled to be indemnified by the verdict. They were entitled to have the value of the horse as a horse to be used in their business, and fitted for that use. Perhaps he would not have been worth anything as a fast trotter or as a gentleman's carriage horse, because not adapted to the work; but that would not depreciate his value as a cart horse, for which purpose he was to be used. The language of the charge may not have been as explicit as it might have been, yet if it does not assert any illegal proposition, as applied to the case, we cannot reverse the judgment; if the defendant desired it to be more full and explicit, he should have required

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Farrel v. Colwell.

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an additional charge upon the point more specific in its character.

I perceive no error in the refusal of the court to charge that the sale to Mulford Cavalier was fraudulent in law. Nothing in the case called for such a charge. The terms of the sale were lawful, if not fraudulent in fact; whether they were so or not was a matter of fact to be determined by the jury.

The court did not submit to the jury the question, whether a partnership existed between Mulford Cavalier and Colwell, and charged the jury that there was such partnership; there was no exception to the charge upon this point, and for that reason no error can be assigned for that cause.

ELMER, J. I concur in the opinion of the Chief Justice. It may be proper, also, to notice two other questions discussed on this argument. The judge charged the jury that "It is necessary, for setting aside a sale as fraudulent in law against creditors, that both vendor and vendee should concur and unite in the collusive device and contrivance; and whether they did so in this case is a question of fact for you to settle upon a view of the whole transaction, there being no substantial evidence to that effect, as in the case of Arvis." This was objected to as erroneous.

That an innocent purchaser of property, who has bought it in a fair and *bona fide* manner for a fair price, cannot be deprived of it because the object of the sale was to defraud his creditors, is clear. The statute of frauds expressly so enacts. (*Nix. Dig.* 329, § 6.)\* Taking into view other parts of the charge, I think this was its purport, and it must have been so understood.

If it appeared that by the expression, "there being no substantial evidence" of a collusive device and contrivance, the jury must have understood that there was no evidence in the case which would justify them in finding the sale of half the property to one of the plaintiffs to be fraudulent. I think it would have been erroneous, for there certainly was

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\* *Rev.*, p. 447, § 15.

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Farrell v. Colwell.

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evidence which might have convinced the jury there was fraud in fact. But this could not have been so understood. In a previous part of the charge, the jury were told, "If the object of the vendor in making the sale was to defeat the claims of any creditors, and the object of purchasing was to enable the father of one of them to accomplish such purpose, then it was a sale to hinder, delay, and defraud creditors, and comes within the decision of the case of *Owen v. Arvis*, cited by the defendants' counsel." In disposing of the facts with reference to this aspect of the case, you should bear in mind that Colwell heretofore had been a stranger to the vendor and his son, and that he paid cash for his interest, and that the other plaintiff has testified that when he purchased he did not know whether his father was in debt.

There can be no doubt, I think, that the question of fraud was submitted to the jury, and that they understood the phrase, "no substantial evidence to that effect as in the case of *Arvis*," to mean, what was evidently intended, that the transaction was not in law such a fraud as made the sale void, however innocent the parties may have been, as was held to be the case in *Owen v. Arvis*, 2 *Dutcher* 23.

The damages assessed would seem to have been for the whole value of the property taken, and upon the supposition that the sale of one-half to Mulford Cavalier was fraudulent and void. I think this would have been erroneous. In that case the other plaintiff, had he sued alone, and there was no plea in abatement, could only have recovered one-half the value. *Bloxam v. Hubbard*, 5 *East's R.* 407; *Addison v. Overend*, 6 *Term R.* 766; *Sedgworth v. Overend*, 7 *Term R.* 279.

By the statute (*Nix. Dig.* 665, § 129,)\* it is provided that the misjoinder of a plaintiff shall not be objected to, unless the defendant give previous written notice of such objection. This provision, I suppose, entitled the plaintiffs to such a verdict and judgment as either of them might have had if he had sued separately.

But no question as to what damages should be given if

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\**Rev.*, p. 853 § 37.



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Farrel v. Colwell.

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the sale to one was found to be fraudulent appears to have been made at the trial. The judge was not asked to charge as to this point, nor is there any error assigned upon it.

VREDENBURGH, J., (dissenting.) This was an action of trespass, brought by Colwell and Cavalier against Farrel for taking and selling a horse and harness. The defendant below, Farrel, justified as constable under a judgment and execution against one Peter Cavalier. The principal question was whether a sale of the articles by Peter Cavalier to the plaintiffs was fraudulent as against creditors.

It appears by the case, that Peter Cavalier became indebted to Randall and Morrell a short time prior to the 19th March, 1860; they obtained judgment against him the 11th July, 1860. Peter Cavalier sold the property, together with a large amount of other property, to the plaintiffs below. The question turned upon the *bona fides* of the sale by Peter Cavalier as regards creditors. The court, among other things, charged the jury that it is necessary, for setting aside a sale as fraudulent in law that both vendor and vendee should concur and unite in the collusive device and contrivance; and whether they did so in this case, is a question of fact for you to settle upon a view of the whole transaction, there being no substantial evidence to that effect, as in the case of Arvis.

It appears to me that this amounts in legal effect to saying to the jury that there was no evidence of fraud.

Now it appears, by the evidence, that Peter Cavalier had been, and was, on the 19th March, 1860, carrying on, in Jersey City, the business of making and selling kindling wood and charcoal, and had three horses and sets of harness, three wagons, one steam engine, boiler, and fixtures, one kindling wood machine, a lot of pine wood, lot of cut wood, lot of tools, one sawing machine, and divers other property, of the value of \$2000, and being in debt, on the 19th March, 1860, by two separate bills of sale, for the nominal sum of \$1545.52, conveyed one half of all his property to each of the plaintiffs; that Colwell paid his one half in money; that Mul-

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Staats v. Bergen.

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ford Cavalier was the son of Peter Cavalier, had just come of age, had no money to buy with, and gave his note to his father for the consideration (\$772.76) of the bill of sale to him payable at a future time; that both bills of sale were given at the same time, and that Colwell stood by and saw young Cavalier give his note for the whole purchase money. It appears to me that this is some evidence of fraud on the part of both plaintiffs which should have gone to the jury.

I am of opinion that the judgment should be reversed.

Judgment affirmed.

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ABRAHAM J. STAATS v. ZACCHEUS BERGEN.

A declaration alleged, that whereas the defendant, by a certain bond, did recite that he held a bond and mortgage given by J. A. S. to him, as trustee, to be appropriated by the defendant to the support of one M. S. during her life, and to pay the residue that might remain in his hands to the plaintiff.

*Held* that a plea averring that the land covered by the mortgage has been sold, and all its proceeds absorbed by prior encumbrances, was a good defence.

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In debt. On demurrer to declaration.

Argued at June term, 1862, before the Chief Justice, and Justices VREDENBURGH and VAN DYKE.

For the plaintiff, *S. B. Ransom*.

For the defendant, *J. W. Dilts*.

CHIEF JUSTICE. The question raised by this demurrer is, whether the defendant is absolutely bound by the bond which he executed as trustee to pay the amount mentioned in a bond and mortgage, assigned to him as such trustee, at all events, or only such moneys as he might receive and collect thereon without default on his part.

The condition of the bond recited that the defendant held a bond and mortgage, given by John A. Staats and Anne his

## Staats v. Bergen.

wife on a farm in Bridgewater township, Somerset county, to secure the sum of \$333.33, with interest, as trustee, to be appropriated by the defendant to the support of one Mary Staats, as far as might be necessary during her natural life, and to the payment of her funeral expenses, and to pay the residue that might remain in his hands to James B. Staats, his heirs or assigns.

The declaration does not aver that he ever received or might have received the money on the bond and mortgage, or any part of it, and avers the death of Mary Staats soon after, before any part of the money had been appropriated for her, and the nonpayment of money to the assignee of James B. Staats.

The plea demurred to alleges the appropriation of the money, so far as was necessary, for Mary Staats; that after her death there was no residue of the money mentioned in the mortgage as remaining in the defendant's hands, all that had been or could be collected having been appropriated for Mary Staats' use or her funeral expenses; and that the defendant had not, and never had any residue of the moneys secured by the bond remaining in his hands.

Upon the pleadings, it is admitted that all that had been or could be collected on the bond and mortgage had been appropriated to the support of Mary Staats and to the payment of her funeral expenses; and that the defendant had not, and never had any residue of the moneys secured by the bond in his hands.

The bond binds defendant, in substance and effect, to appropriate a bond and mortgage, held by him as trustee, to the support and funeral expenses of Mary Staats, and to pay the residue that might remain in his hands to James B. Staats, his heirs and assigns.

It is not a bond to appropriate the sum of \$333.33 in consideration of his holding the bond and mortgage as trustee, but to appropriate *the bond and mortgage*: that could not be done unless it was collected and received; he held the bond and mortgage as trustee, not the money. If the bond and

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Staats v. Bergen.

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mortgage was valueless, his agreement was impossible of performance, and he was excused.

There is an implied covenant to collect the money, if possible, on the bond and mortgage, and apply it to the purposes of the trust. That is implied by the word appropriate.

As it appears by the record that the money was never collected, and never could be, and that without any default of the trustee, there must be judgment for the defendant.

VREDENBURGH, J. This was an action of debt. The declaration alleges, that whereas the defendant, on the 31st of October, 1860, by a certain bond, did recite and witness that he held a bond and mortgage, given by John A. Staats, on a farm in Bridgewater, to secure the sum of \$333.33, with interest thereon, as trustee, to be appropriated by the defendant to the support of one Mary Staats, so far as it might be necessary during her natural life, and to the payment of her funeral expenses, and that he, the defendant, by the said bond, promised to pay the residue that might remain in his hands to the plaintiff within one year after the decease of said Mary, and avers that Mary Staats died on 14th February, 1861, before the said defendant had expended any part of the \$333.33 for the support of the said Mary.

To this the defendant has pleaded, in substance, that before this suit was brought the premises on which the mortgage was, had been sold by prior encumbrancers, and did not bring enough to pay them off, and that he has realized nothing, and can realize nothing from said bond and mortgage.

To this the plaintiff has demurred. Whenever there is a demurrer to a plea, we may inquire if the declaration discloses a legal cause of action. In this case I think it does not. It merely shows that the defendant held a bond and mortgage upon certain trusts. There is nothing to show that he intended to make himself personally liable for the amount of money secured by the mortgage, but only that he would perform the trusts; that he would appropriate so much of the mortgage as he should receive or realize—first,



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Staats v. Bergen.

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for the support of Mary Staats; second, to pay the expenses of her funeral; and third, pay over the balance he should realize to the plaintiff.

The language of the bond is "pay the residue that might remain in his hands to the plaintiff," not pay the whole money secured by the mortgage, but the residue that might remain in his hands. If none could be collected on the mortgage nothing remained. In order to have made the declaration good, it should have averred that the defendant had either collected the money on the bond and mortgage, or by due diligence might have collected the same.

But whether the declaration be good or not, the plea and the notice clearly raise a good defence. It is not the intention of the instrument that the defendant should be absolutely liable for the money secured by the bond and mortgage.

The demurrer should be overruled.

VAN DYKE, J. I do not think the plea demurred to in this case is double, within the legal meaning of that term, to the extent of making it bad. The latter part of the plea, which is supposed to give it a double aspect, does not raise any new matter, but is a kind of repetition of what is before stated. The plea is good, I think, without it, and it may be rejected as surplusage.

The plea avers that, before the commencement of the suit, the defendant had appropriated all the money that had been, or that could have been, or that can be collected on the bond and mortgage referred to, to the support of the said Mary Staats and to the payment of her funeral expenses. If he did this, I think it should operate as a defence to this suit.

The defendant held these papers as a mere trustee, and the paper on which the action is brought is but a declaration of trust showing how the moneys supposed to be secured by the bond and mortgage were to be used and paid by him; and although the language of the latter clause of that instrument is strong, binding himself by an express promise

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Jones v. Vail.

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to pay to the plaintiff and his heirs and assigns all of the residue which should remain in his hands, yet it will be observed that this strong language only applies to such residue as should *remain in his hands*, that is such residue as he had or might have collected; but if he has appropriated all the money that he could by possibility have collected on the bond and mortgage to the support of his *cestui que trust* and to her funeral expenses, so that there cannot be and could not have been any residue in his hands at any time, he has fully discharged the duties of his trust, and can no longer be held responsible. As a mere trustee, it cannot be supposed that he was to pay over any money to any party that he never received, and which no effort of his could have enabled him to collect.

I think, therefore, the plea is good, and the demurrer should be overruled.

Judgment for defendant.

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SAMUEL JONES v. STEPHEN VAIL.

New trial applied for on the ground that a witness for the defendant made statements in the hearing of some of the jury which might have influenced the verdict, but refused, as it appears that there was no evil intention, that the defendant had no concern in the transaction and that the verdict was satisfactory to the court.

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This was an action of assumpsit, tried before Mr. Justice BROWN at the Morris Circuit Court. A verdict having been rendered for the defendant, a rule to show cause why there should not be a new trial was allowed, which was argued at June term, 1862, by *Theodore Little*, for the plaintiff, and *Vanatta*, for defendant, before Justices HAINES, VAN DYKE, and ELMER. The CHIEF JUSTICE, having been counsel in the case, did not sit.

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Jones v. Vail.

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The opinion of the court was delivered by

ELMER, J. The first ground relied upon for a new trial was that the verdict was against the weight of evidence. A careful examination of the evidence has satisfied me that the verdict was correct. It may be added that it was satisfactory to the judge who tried the case, and that the rule to show cause was not allowed because of any doubt on this question.

The second reason urged, namely, that the jury was improperly influenced by the conversation of a person acting as the agent of the defendant, or intimately connected with him, presents a question of more difficulty. Was it fully supported by the depositions produced to prove it, or was there reason to suspect that what took place was in any way produced, or even connived at, by the party in whose favor the verdict was rendered, there could be no hesitation in submitting the case to the decision of another jury. The duty of guarding trials by jury from all improper influences is too important to allow us to overlook any attempt to interfere with them.

It appears that a prominent witness for the defendant, who had been selected as an assignee, and thus became connected with some of the transactions drawn in question, entered into conversation with a friend, on the piazza of the hotel, during the progress of the trial, and made some statements which, if heard and understood by the jury, might have influenced their decision. Two of the jurors were present, and heard, or might have heard, more or less of this conversation. It satisfactorily appears, however, that it was an accidental conversation, and that there was no design to influence the decision of the jury; and it is quite uncertain whether either of the jurymen present heard enough to produce any effect. There is no reason to suspect that the defendant had the slightest participation in the occurrence, directly or indirectly, and what is perhaps more important, there was no evil result, the verdict actually rendered being warranted by the evidence. No improper conduct is imput-

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State v. Hudson County.

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able to any of the jurymen. Had the verdict been of even doubtful propriety, it might be proper to interfere, even at the risk of occasioning great hardship to an innocent party; but as the case is presented, I think the verdict should stand, and the rule to show cause be discharged.

Rule discharged.

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THE STATE v. INHABITANTS OF THE COUNTY OF HUDSON.

1. The inhabitants of counties were not indictable at common law for not repairing bridges over canals, but only bridges over rivers.
  2. The inhabitants of counties in this state are not indictable for not repairing bridges over rivers in this state.
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On *certiorari* and motion to quash indictment.

In 1862, at the Court of Oyer and Terminer in and for the county of Hudson, a bill of indictment was found against the inhabitants of the county for not repairing a certain common and public bridge over the Morris canal, in said county, being a common highway, which had become dangerous to pass, and which the county was bound to repair.

The indictment having been removed into this court by *certiorari*, a motion was made to quash it, on the ground that it set forth no indictable offence.

The motion was argued by A. O. Zabriskie, for plaintiff in *certiorari*. I. W. Scudder, for the State.

The opinion of the court was delivered by

VREDENBURGH, J. The defendants move to quash this indictment, on the ground that in New Jersey the inhabitants of a county are not liable to indictment for not repairing bridges. The indictment avers that, from the 1st January, 1861, there was and is a certain common and



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State v. Hudson County.

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public bridge over the Morris canal, in said county, being a common highway, which bridge is and was broken and dangerous for want of necessary repairs, so that the citizens cannot pass without danger, and that the inhabitants of the county have been and still of right are bound to repair it, to the common nuisance of said citizens.

The defendants now move to quash this indictment, upon the ground that the inhabitants of the county are not bound to repair it.

This leads to the following inquiries :

1st. Were the inhabitants of a county, at common law, bound to repair public bridges ?

2d. If they were, was that common law adopted in this state ?

3d. If it was not, has any such liability been created by our statutes ?

Were the inhabitants of counties in England, by their common law, liable to repair public bridges ?

This is too well settled by authority and the judicial history of England to be questioned. Indeed, I do not understand it, on this motion, to have been seriously contested.

The authorities upon this subject are abundant. 2 *Institutes* 700, 701 ; *Croke Charles* 365 ; *Langforth bridge case*, 2 *East* 342, 356 ; 5 *Burrows* 2594. So ancient in this doctrine, that the statute of 22 Henry VIII., recognizing the principle, has always been held as but declaratory of the common law. It was evidently originated in times of much higher antiquity.

2d. Was this principle of the common law adopted in this state ? The body of the common law, so far as it was adapted to our circumstances, undoubtedly was. But an examination of the early legislation of this colony will show, I think, that the principle now in question was an exception to the general rule. The first act relating to the subject was passed by East Jersey in 1682, *Leam. & Spicer*, page 257, which provided that in and through the province all necessary highways, bridges, &c., from and after 1682, for

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State v. Hudson County.

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travelling, shall be laid out through every county by certain persons (naming them), and that the said highways and bridges are and shall be accounted to belong to the said respective county, and shall be made, maintained, repaired, and kept up at the charge of every respective person, town, or township to whom or where they are most serviceable or do or shall most immediately belong or appertain. In 1686, the legislature of East Jersey appointed other persons to supply the place of those who in the meantime had died. In the same year, 1686, another act was passed, *Leam. & Spicer* 294, entitled an act for rates for highways, reciting that whereas it is provided by act, that certain persons be appointed in each county for the laying out of highways and bridges, and no provision is yet made for empowering the inhabitants of each town or hamlet to make assessments for defraying the charge, provides that the inhabitants of each town or hamlet, or out plantations, by warrant from justices of the peace of such town or hamlet, choose four or five inhabitants, who shall have power to make such taxes for erecting and maintaining bridges; so that in East Jersey, at least so early as 1682 and 1686, the repairing of bridges was charged not upon the inhabitants of the county, but upon those of the townships, and put, as it rightly should be, upon the same footing as highways.

In 1694, *Leam. & Spicer* 346, reciting the act of 1682, the legislature appointed other persons in the place of those named in the act of 1682, who had in the meantime died.

By an act passed in West Jersey in 1684, before West Jersey was yet divided into counties (*Leam. & Spicer* 493), the building and repairing of roads and bridges were made chargeable upon each respective tenth. Counties were not mentioned in New Jersey till 1694. *Leam. & Spicer* 530. So that, up to the surrender in 1703, the charge of repairing bridges, by express enactment in East Jersey, was upon the towns, and in West Jersey upon the tenths, and not upon the inhabitants of the counties. After the surrender in 1718, 1 *Nevill* 84, the legislature passed an act entitled "an act for

## State v. Hudson County.

the building, rebuilding, repairing, or amending of bridges in the respective towns and precincts within this province," and which act minutely regulated the whole subject of bridges, charges their repairs expressly upon the towns, and provides all the machinery for the collection of the necessary taxes. This principle is further recognized by the act passed in 1723. 1 *Nevill* 168, § 9.

That the repairing of bridges by the general laws of the province was chargeable upon the towns, and not upon the counties, is expressly recited in the act of the legislature passed 1741. 1 *Nevill* 275. It is an act entitled "an act for building, rebuilding, and repairing bridges in the county of Essex," and recites—whereas the district of Acquackanonk, in the county of Essex, is for a considerable space in length bounded on the river Passaic, which divides Essex from Morris and Bergen, over which river several very large bridges are already built, and more may be hereafter necessary, the one half of the expense whereof the inhabitants of said Acquackanonk are by *the general laws of the province liable to*, whose situation being very peculiar, the taxes on the said inhabitants are much greater than those of the other town-ships of Essex, whereupon the inhabitants of Acquackanonk have prayed relief.

The act then charges the expense of all building and repairing such bridges and the whole of the expenses of all other bridges upon the whole county of Essex.

Nothing can be plainer than that, at the passage of this act in 1741, no such common law was recognized in West Jersey as made the repairing of bridges chargeable upon the counties. By the act passed in 1760, 2 *Nevill* 356, § 25, 26, 27, it was still recognized as the general law, that the repairing of bridges was chargeable upon the townships, and such general law is altered in several respects by said act. The 25th section of this act, reciting—that whereas there are many bridges within this province which belong to particular towns and precincts to amend and repair, which cannot be sufficiently repaired by day labor without

## State v. Hudson County.

the assistance of particular handicraftsmen, be it enacted, that where there are *any bridges in any* of the *towns* within the counties of Burlington, Somerset, Gloucester, Salem, Cumberland and Sussex, which cannot well be repaired by day laborers, that the overseers, &c., shall contract with tradesmen and have them built, and collect the money from the towns where they are located; and the 27th section of the same act, reciting, that whereas the following counties, Middlesex, Monmouth, Essex, Bergen, Hunterdon and Morris, have formally requested, and some have by their humble petition, presented to the house this session, desired that all bridges requiring handiwork may be *built, rebuilt, repaired, and amended at the sole charge and expense of the whole county* where such bridges do lie, enacted that all bridges within said counties last aforesaid that require handiwork and shall want repairing, that the freeholders shall contract and assess the costs upon the inhabitants of the counties. So that in 1760, at the passage of this act, no such common law as that the inhabitants of counties were chargeable for the repairs of bridges existed. If the county became responsible it was by force of the statute, and not of common law. This act remained in force until 1774, when it was repealed by the act entitled an act for regulating roads and bridges. *Allinson's Laws* 386, § 46. This act of 1774, sections 27 and 28, copies very nearly the recitations in the act of 1760, showing that then, if the counties were chargeable at all, it was by force of statutory law, and not at common law.

Two years after came the Revolution and the first constitution of this state. This provides that so much of the statute law and the common law of England as had been used here should *continue* in force. As no English statute had ever charged the repairing of bridges upon the inhabitants of the counties of this colony, but, on the contrary, the statute of this colony had for an hundred years charged it upon the townships, of course neither the statute of 22 Henry VIII., nor any other English statute, affected the question; and as



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State v. Hudson County.

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no principle of the common law, in the presence of these colonial statutes, could have made the counties chargeable. there was, at the adoption of the constitution of 1776, no such English common law to be continued. If, therefore, the inhabitants of counties are chargeable for the repair of bridges in the townships it must be by force of some colonial or state statute.

It is a principle of the common law which has been adopted in this state, that where any duty to the public is imposed either by the common or statute law the party so charged is indictable for neglect. If either the common or statute law imposed upon the inhabitants of counties the duty to repair bridges, they are indictable if they allow them to go out of repair. But we have seen that the common law imposed no such duty, because the statute law of the colony placed that duty on the townships.

The only question remaining is, has any colonial or state statute imposed that duty, so as to make the whole of the inhabitants of a county indictable?

The inhabitants of the counties in England were indictable by virtue of two principles of the common law. The first was, that the common law imposed the duty upon all and every inhabitant of the county, jointly and severally, to keep the bridges in repair. The second was, that if they did not perform this duty they were indictable. Here, in this state, we have seen that the common law imposed no such duty on the inhabitants, and consequently, then, the principle that they could be indicted did not apply. But it may be said here, that although no common law imposes such duty, yet that a statute does, and they therefore are indictable; so that the question is, does any statute in New Jersey re-enact the common law of England, and impose it as a duty upon the inhabitants of a county to repair the bridges? The duty should be plainly and directly imposed before we should decide that it does. For what are the consequences? This principle of the common law, that it was the duty of the inhabitants of counties to repair, was a duty imposed by virtue

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State v. Hudson County.

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of their inhabitancy, and in case of neglect, all and each, collectively or individually, could be indicted, and each one was liable in his own person and property to punishment as for a nuisance. The indictment and conviction operate the same as if each one was named in the indictment, and they are not named only because of the inconvenience of the thing. Each inhabitant of the county, upon conviction, is liable to be sent to the state prison for two years as for a nuisance. As Chief Justice Holt said in the case of *Regina v. The Inhabitants of the County of Wilts*, 6 *Mod.* 307, "If the order to repair be not obeyed, an attachment may issue against the inhabitants of the whole county, and catch as many as one can of them;" and among the first of whom, I might add, might probably be the prosecutor of the pleas of the county of Hudson.

Our statutes must therefore, to sustain this indictment, charge the repair of bridges as a personal duty upon all and each of the inhabitants of the county, as a personal obligation. Such was the principle of the common law, and it was because of such a principle that they were indictable. Now had we any such statutes in force when this crime of omission, now complained of in 1860-1, was committed?

The first act to which our attention has been called, is the one incorporating the board of freeholders. *Nix. Dig.* 109.\* This act has been in force, substantially as it is now, since 1794. If this act had said that the inhabitants of the counties shall repair bridges, it would have re-enacted the common law of England, and each man in the county would have been indictable for their want of repair.

But this act does no such thing. It first incorporates the board of freeholders, and then gives them power to raise such sums of money for repairing bridges as they shall deem adequate and proper. Now is it not patent, at the first glance, that this is an entirely different thing from making it the duty of the inhabitants to repair bridges? So far from doing so, it places the duty, if anywhere, upon the freeholders, not upon the inhabitants.

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\* *Rev.*, p. 127.

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State v. Hudson County.

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Suppose the freeholders raised as much as they should deem adequate and proper, did the act mean to make every inhabitant of the county indictable because somebody else might think some other sum adequate and proper? or, if they did not raise as much as they thought adequate and proper, that the inhabitants were to be indicted for the corruption of the board of freeholders; that one set of men should commit the crime, and another set suffer the punishment?

But again, if the inhabitants are indictable under this act for not repairing bridges, they are also liable to indictment because the board do not purchase, build, and repair poor-houses, jails, court-houses, and a variety of other matters, which are all put by the act upon the same footing. It is apparent that the object of this act, so far from being designed to re-enact the old common law principle making it the duty of the inhabitants, as individuals, to repair bridges under the penalty of indictment, was enacted to provide machinery to answer the public purposes without that principle.

But it is said that the freeholders are but the agents of the county to repair, and if they do not, the inhabitants must. That is assuming that the inhabitants are liable at common law, which we have shown not to exist. So far as the statute is concerned, they are not agents of the county. They are chosen by the towns, and are created by the legislature a tribunal to tax the inhabitants at their discretion; and because they have the power to tax the inhabitants more or less, are the inhabitants indictable because opinions may differ as to the amount the freeholders, in the fair discharge of their duty, ought to tax? The freeholders are agents of the county, not as constables and other township officers are agents; and we might just as well indict all the inhabitants of a county because a constable will not serve a warrant or a justice of the peace hear a cause.

We are next referred to the statute concerning bridges, *Nix. Dig.* 79.\* This act has also substantially been in force since 1798. It provides that when bridges are to be built or repaired, the overseers of the highways are to give notice to

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\* *Rev.*, p. 54.

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State v. Hudson County.

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the board of freeholders, or part of them, and then the freeholders are to decide upon the matter, and if to build, to pay the expenses out of the county funds. How this provides that the inhabitants shall be indictable for not repairing, is more than I can see. If they, under this statute, are indictable for not repairing, they are also indictable for not building, which was never the case at common law. But how is it, or why is it, that because the freeholders are to *decide* whether they will repair or not, and to pay out of the county funds if they do decide to repair, that the inhabitants are indictable if the freeholders decide the one way or the other?

The truth of the whole matter is obviously this: by the common law of England, the inhabitants of counties, from time immemorial, had been charged for the repair of bridges within their bounds, and were indictable in the King's Bench for not doing so. They were not indictable as a corporation, but individually and by reason of their inhabitancy of the county, like hundreds were under the constitution of king Alfred, for a loss within their bounds by robbery. This was an inconvenient arrangement. The inhabitants had no, or very inconvenient, machinery to raise the money or fine among themselves. The sentence went against them individually, and enforced against the first the officers could catch, and kept on till the bridge was repaired; and those who were so unlucky as to be caught had to get contribution from the rest of the inhabitants as best they could. Then came the statute of 22 Henry VIII., upon which have been built and framed all the acts passed both in England and this state since, and by paring, chipping, and patching which our own present statutes have been formed. The statute of 22 Henry VIII. had two objects in view; one was to give the Quarter Sessions jurisdiction over indictments at common law for not repairing bridges, and so bring justice near the people; and the other was to provide convenient machinery to raise taxes to repair bridges, and by that means prevent the necessity of indicting the inhabitants for not repairing.

The statute of 22 Henry VIII. consequently left there un-



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State v. Hudson County.

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touched the common law principle, that the inhabitants of counties should repair, and gave, first, jurisdiction to the Quarter Sessions, as well as the King's Bench, to try and present the inhabitants for not repairing; and second, by giving to certain officers power to raise taxes to repair bridges. This statute consequently left the inhabitants of counties in England liable to indictment if for any reason the bridges were not repaired.

But when this colony began to be settled, almost the first thing they did was to relieve the inhabitants of counties from the obligation to repair, by putting it on the townships, and so the liability remained here for an hundred years, and until the Revolution.

The statute of 22 Henry VIII. provided a tribunal to adjudicate if the repairs were necessary before the tax to repair was ordered, and these matters were modified by subsequent English statutes. The first attempt on the part of this colony to assimilate our legislation to that of England was the act of 1760.

Our legislature, from time to time since 1760, have attempted to further assimilate our legislation on this subject to that of England, and of which the statute of 22 Henry VIII. is the groundwork. But in all our attempts, we have assiduously and always ignored the principle of holding the *inhabitants of counties* responsible for repairs. Finding, in 1760 and since, that this liability had always been on the townships, our legislatures have merely followed the statute of 22 Henry VIII. so far as to provide a tribunal to decide upon the necessity of the repair and the machinery for the necessary taxation. The consequence was, that as the statute of 22 Henry VIII. found the inhabitants of the county in England responsible for repairs, it left them so, and our statutes finding them not responsible, left them so, and both provided a tribunal to decide upon their necessity and the machinery to collect the necessary taxes. Thus the colonial acts of 1760 and of 1774 required the justices of certain of the counties to decide upon the necessity of the repair, and

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State v. Hudson County.

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then ordered the freeholders absolutely to repair. This might have made the freeholders liable to indictment, but certainly could not make the inhabitants of the county liable. But whether it did or not, these acts were repealed in 1798 by the acts now in force.

The laws now in force, *Nix. Dig.* 110 and 79,\* substitute the board of freeholders in the place of all the other machinery in the act of 22 Henry VIII. for adjudicating if the repairs be necessary, and upon the amount and the raising of the tax; and all the rest of the statute of 22 Henry VIII. affirming the common law liability of the inhabitants of the county is certainly left out, showing that the legislature never meant to re-enact in this state the liability of the *inhabitants* of counties, but to place the whole matter of *building*, as well as repairing bridges, under the discretion of a tribunal created by themselves for that purpose.

This legislation might, perhaps, have relieved the inhabitants of *townships* from the liability of indictment for not repairing, but could not thereby impose any such consequences upon the inhabitants of *counties*. The question whether the inhabitants of townships or the board of freeholders can be indicted for not repairing bridges, is not now before us, and all we could say upon these subjects would be mere *dicta*. We only wish not to be considered as acquiescing in the *dicta* in the books, that the board of freeholders may be indicted.

But it appears to me, that there is another fatal defect upon the face of this indictment. It charges that the bridge over the Morris canal is out of repair, and that the inhabitants of Hudson are bound to repair. Now, supposing the old English common law to be in force here, what authority, ancient or modern, can be found that all the inhabitants of a county, at common law, were indictable for not repairing a bridge over a canal? A bridge over a canal is not such a bridge as the inhabitants, at common law, were indictable for not repairing. Canals are devices contrived long after this common law was made. A bridge, in the technical

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\**Rev.*, pp. 127, 84.

## State v. Jersey City.

meaning of the common law, *ex vi termini*, was a structure for passage over a river, not over a ditch.

The old indictment used to run, that a certain "*pons super flumen*" was out of repair—a structure over running water—and these words are left out of the more modern indictments only because it was supposed that the term bridge meant *ex vi termini pons super flumen*.

A canal is of nearer kin to ditch than it is to a run. It is nothing more nor less than obstruction to the highway, and its repair can only be a question between the township or the board of freeholders and the canal company, and not between the canal company and the inhabitants of the county.

The inhabitants of counties were never responsible at common law for artificial obstructions in a highway, and bound to build bridges over them under penalty of indictment. They are not bound to build bridges by force of the common law of England over walls, or railroads, or gutters, or ditches, or mere puddles, but over those obstructions in highways arising from flowing waters.

The only bridges they were bound to repair were *pontes super flumina*.

CITED in *Whitall v. Freeholders of Gloucester*, 11 Vroom 306.

THE STATE, VICTOR PIARD AND OTHERS, PROSECUTORS, v.  
THE MAYOR AND COMMON COUNCIL OF JERSEY CITY.

SAME v. THE WATER COMMISSIONERS OF JERSEY CITY.

1. The water commissioners of Jersey City are authorized to execute the plan of sewerage adopted by them, "with such changes or alterations as may be found convenient or necessary in the progress of the work;" if the general plan contemplated the use of an old sewer, the commissioners, if they find it convenient and necessary, may abandon that part of the plan, and construct a new sewer in place of the old one. Of this the commissioners are the sole judges, and having acted thereon, this court has no authority to review their decision.
2. The charter requires the signature of the mayor to all resolutions affecting the interests of the city: *held*, that a resolution of the com-

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State v. Jersey City.

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mon council referring a petition for a sewer to the committee on sewerage does not require the signature of the mayor.

3. By the act of 1854, (*Laws* 1854, 404,) the legislature intended, after the general plan of sewerage was adopted by the city, to secure the execution of it by the water commissioners, and to take from the mayor and common council all duties and authority respecting it, except on application, after giving notice and hearing objections, to determine *the time when* the work, or any part of it should be done.
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On *certiorari* to review proceedings of the common council and the water commissioners of Jersey City.

For the plaintiff, *I. W. Scudder*.

For the defendant, ————.

The opinion of the court was delivered by

BROWN, J. These *certioraris* bring up for review the proceedings of the common council and the water commissioners of Jersey City, in relation to the construction of the Grand street sewer, and the assessment of the expenses of the same upon the owners of property.

The first reason assigned on the argument was, that the proposition for the improvement, as made in the petition, was vague.

This reason is not supported by the facts. The *termini* of the sewer are stated in the petition, its connections, the mode of finishing, and lateral sewers, the whole to be done according to the general plan of sewerage. The city had previously adopted a general plan of sewerage, and the same had been sanctioned by law. The proposition, taken in connection with the reference to this plan, seems sufficiently definite.

The next point made against the proceedings was, that the proposition for a new sewer in Grand street was a departure from the plan of sewerage referred to; that the plan adopted an existing sewer as part of it, and this proposition was for a new sewer. I have not the means before me of ascertaining the fact as to this; but the application is made



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State v. Jersey City.

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for a work to be done according to the general plan of sewerage, and the order of the common council directing the water commissioners to proceed with the work contains, also, a direction that the whole shall conform to the general plan of city sewerage. If the water commissioners have departed from that plan, it is not therefore by the order of the common council, but by their own authority. The legislation respecting the sewerage of Jersey City gives to the water commissioners authority to execute the plan, "with such changes or alterations as may be found convenient or necessary in the progress of the work." *Laws of 1854*, 403, § 1. If the general plan contemplated the use of an old sewer, it is manifest that, in attempting to execute it, the commissioners might find it convenient and necessary to abandon that part of the plan, and construct a new sewer in place of the old. Of this the commissioners are the sole judges, and having acted upon their judgment, this court has no authority to review their decision. This point was considered by the Court of Errors and Appeals in the case of *The State, Vanderbeck and others, prosecutors, v. Jersey City*, 5 *Dutcher* 441, and several material departures from the general plan held not to be fatal to the proceedings and assessment. The opinion of the court was read by the Chancellor, and the power of the commissioners so to vary the work fully sustained.

Again, it is objected that the notice to persons interested required objections in writing, when they were by the charter entitled to a hearing.

It appears, by the return, that two notices were given, one for a hearing before the committee on sewers, and the other for objections in writing to be made to the common council; the latter was not required, but the proceedings are not therefore invalid. The hearing was not limited to objections in writing.

Again, it is objected that the resolution, passed April 7th, 1857, by the council, referring the petition to the committee on sewerage, was not signed by the mayor. The charter requires the signature of the mayor to all resolutions affect-

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State v. Jersey City.

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ing the interests of the city. As the city at large pays no part of the expenses of this improvement, and only a portion is benefited by it, it cannot be said that such a resolution affects the interests of the city.

Several objections are taken to other proceedings of the council which seem to have been necessary, and if so, these objections need not be considered.

By the supplement to the act to authorize the construction of works for the supplying of Jersey City with water, passed March 16th, 1854, *Laws*, 403, § 3, it is provided, that when application shall be made to the council to have a sewer constructed, the same preliminary proceedings shall be had as are now authorized by the charter; and if the council, after consideration of the application and objections, shall decide that the sewer ought to be constructed, they shall give notice in writing of such decision to the water commissioners, who shall thereupon proceed to construct the same. The preliminary proceedings here referred to are those only which precede the decision of the council that the sewer should be constructed; and this decision, by the charter, is to follow immediately upon the hearing of objections to the proposition, on notice of time and place for that purpose. This appears clearly by reference to the 55th section of the charter. (*Laws* 1951, 416.) It is there enacted that, when any application shall be made for constructing sewers, the council shall appoint a time when persons interested therein may be heard before them, or the appropriate committee, on the merits of such application, and shall give notice, &c.; and if the council shall determine to construct such sewers, they shall appoint commissioners to assess the cost upon the lands benefited, &c. This section further provides, that if a remonstrance be filed by one-half of the owners of the lands assessed the council shall proceed no further; and if no remonstrance, then the work shall be done and the assessments paid. It provides also an appeal for any landholder who is dissatisfied. All these proceedings for assessment of cost upon lands benefited are repealed, so far as respects the construction of sewers. No commissioners should be appointed,

## Betts v. Francis.

and a remonstrance of the owners would be of no avail. By the act of 1854, above referred to, as soon as the council shall determine to construct the sewer they are (not to appoint commissioners) but to give notice in writing to the water commissioners, who are thereupon to proceed to construct the same; and when constructed, by section 4th of the same act, the water commissioners (not commissioners appointed by council) are to assess, not according to benefits, but in proportion to dimensions, without reference to situation or value. It is quite clear that the legislature intended, after the general plan of sewerage was adopted by the city, to confirm it by law, to secure the execution of it by the water commissioners, and to take from the mayor and common council all duties and authority respecting it, except on application, after giving notice and hearing objections, to determine *the time when* the work, or any part of it, should be done. In these particulars the law has been complied with, and whatever else may have been erroneously done furnishes no reason for setting aside these proceedings. The objection, that the property had been assessed for the old sewer, and ought not therefore to be again assessed, is answered by the case of *The State, Vanderbeck and others, prosecutors, v. Jersey City*, above referred to.

## Proceedings confirmed.

CITED in *State, Fiacre et al., pros., v. Mayor, &c., of Jersey City*, 5 Vroom 279.

## FREDERICK B. BETTS v. JOHN M. FRANCIS.

1. Title to goods and chattels may pass by gift *inter vivos* when there is a delivery of the property. Mere delivery of the goods will not in general pass the title; there must be an intention to give accompanying the act of delivery in order to consummate the gift, or the circumstances attending the delivery of the goods must be such as ordinarily accompany a gift, inducing the donee to believe that a gift was intended. If that be the case, the title to the goods will pass, although it may not be the secret intention of the donor to make a gift.
2. When a gift is completed by delivery and acceptance of the chattel, it is irrevocable. So long as there is no delivery and acceptance it may be revoked.

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Betts v. Francis.

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In replevin. On rule to show cause why verdict should not be set aside.

This was an action brought in this court, and upon the trial of the issue at the Hudson Circuit, at the term of December, 1861, a verdict was rendered for the plaintiff for six cents damages. On the coming in of the *postea*, a rule was obtained that the defendant should show cause why the verdict should not be set aside, and a new trial granted. The principal reason assigned was, that the judge at the trial charged the jury erroneously in regard to the legal title to the property in dispute.

The rule was argued by *C. H. Winfield*, for the plaintiff, and *J. R. Wortendyke*, for the defendant.

The opinion of the court was delivered by the

CHIEF JUSTICE. The point litigated in this action of replevin at the circuit was whether the property replevied was in the plaintiff in replevin, Frederick B. Betts, or in one Archibald G. Rogers, who claimed it by virtue of a mortgage upon the same, executed by Frederick F. Betts, the son of Frederick B. Betts, to secure a debt due to Rogers, in part for money borrowed at the time of the execution of the mortgage, and in part for a debt then due from the mortgagor to the mortgagee.

At the time of the execution of the mortgage the son was, with his wife, keeping house in Jersey City, using the furniture, the subject of the replevin, for that purpose, and being in its sole and exclusive possession. Before Rogers would advance the money on the mortgage to Betts, who applied to him for it, he required him to make an affidavit that the property was his, which he did.

Previous to this time, Betts the younger had been insolvent, and had been relieved from his debt by the two-thirds act in New York, where he resided at that time. Rogers was one of his creditors. He married, and for a time lived with his father in Jersey City.



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Betts v. Francis.

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His father hired the house in Jersey City for his son, and purchased the furniture in controversy, and placed it in the house for his son's use. The son and his wife then commenced housekeeping.

At the time of the purchase of the furniture, and putting it in the son's possession, nothing was said by the father to the son as to the ownership of the furniture; the father did not intimate that the furniture was not to be a gift from him to his son.

On the trial, the father testified that he did not intend to give the furniture to his son when he placed it in the house, and intended to retain the property in himself. He said he never removed any of the goods while his son was keeping house; that he could not say what acts of ownership he had exercised over the goods while there; that his son, his wife, and his son's mother-in-law lived in the house; that he put the goods there for him to enjoy. The son went to the house to live in the spring of 1859, and left there in February, 1861. The son, during this time, was in the employ of the father, at a salary of \$2000.

Upon this state of facts, the judge at the circuit refused to submit the question, whether the property had been given by the father to the son, to the jury; charging that the son had no claim to the property as against the father, and as a consequence, that the mortgage given by him to Rogers was invalid.

Title to goods and chattels may pass by gift *inter vivos* when there is a delivery of the property. Mere delivery of the goods will not in general pass the title: there must be an intention to give accompanying the act of delivery in order to consummate the gift, or the circumstances authorizing the delivery of the goods must be such as ordinarily accompany a gift, inducing the donee to believe that a gift was intended; if that be the case the title to the goods will pass, although it may not be the secret intention of the donor to make a gift.

The donor may not deliver the property to the donee with

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Betts v. Francis.

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all the usual circumstances attending a gift, and denoting it, suffer the donee to remain in possession for an indefinite period, and then, under perhaps changed circumstances, divest the apparent owner of his property by coming upon the stand, and declaring that it was not his intention to make a gift.

When a gift is completed by delivery and acceptance of the chattel it is irrevocable. So long as there is no delivery and acceptance it may be revoked. 2 *Kent's Com.* 438; 2 *Bl. Com.* 441. .

The law will raise the presumption of a gift by father to son from circumstances where it would not be implied between strangers. *Ridgway v. English*, 2 *Zab.* 409.

On a purchase of land by the father in the name of the son a trust will not result to the father, unless there be other evidence to rebut the presumption of a gift or advancement arising from the relation of parent and child. *Lewin on Trusts* 207, and cases there cited.

When a son or daughter marries, and is about setting up a separate establishment, and the father provides the necessary outfit for housekeeping, such as proper furniture for the dwelling house, and transfers the possession to the son or daughter without qualification or reservation made at the time, a presumption arises that the transaction is a gift, prompted by natural affection of the donor, and this presumption should prevail. But it is a presumption of fact for the jury, and not of law for the court. This presumption is liable to be rebutted by other evidence showing that the donor and donee did not so consider it.

It is a presumption of fact, because such conduct is universally considered as denoting a gift of the chattels.

What would be thought of a father who would furnish his daughter's house, put his son-in-law in possession of the furniture, and in a year or two demand possession, and bring replevin for its recovery?

In what does the case of furnishing a son's house differ from the one just put? The usage of society is the same in

## Betts v. Francis.

both cases. The case of the furniture of a house seems to raise the strongest possible presumption of a gift—much stronger than putting the son in possession of a horse or a slave.

The course of judicial decision on this point has not been uniform, and for the reason, perhaps, that in the cases that have come before the courts the question has arisen between the father seeking to exempt the property from seizure for the debts of the son or son-in-law and his creditors. 2 *Phil. on Ex.* 289, 294; *Hollowell v. Spinner*, 4 *Irelell* 165; *Farrel v. Perry*, 1 *Hay'd Rep.* 2; *Carter's Ex'rs v. Rutland*, 1 *Hay'd* 97; *Ford v. Aikin*, 4 *Rich.* 133; *Keene v. Macey*, 4 *Bibb* 35, are authorities supporting the view I have taken of this question. *Collins v. Loffus*, 10 *Leigh* 10; *Slaughter's Adm'r v. Tutt*, 12 *Leigh* 156, are decisions to the contrary.

If the son's right to hold the property was complete, he could mortgage it to secure a precedent debt, or one contracted at the time.

Where the father puts the son in possession of household furniture suitable to his station in life, without acquainting him that the transaction is not what on its face it purports to be, and what the world understands it to be, he puts in the power of the son honestly to represent it as his own, and to contract debts on its security, and he should not be allowed to deprive creditors of their security by an *ex post facto* promulgation of his secret intentions. By his own conduct he authorizes the son to assert a property in the goods; and if creditors act upon his assertion, and advance money, or suffer the son to contract a debt on the faith of the property, the father ought not to be permitted to dispute the son's right. In such case the father is bound by the son's declaration as if it were his own.

The question whether F. F. Betts was the owner of the property by gift from his father, should have been left to the jury, with proper instructions. This was not done, and for this cause I think the verdict should be set aside, and a new trial granted.

Verdict set aside.

## Betts v. Francis.

ELMER, J. The goods and chattels in dispute, consisting of household furniture, were mortgaged to Archibald J. Rogers, by Frederick F. Betts, November 1st, 1859, and the defendant claims them under that instrument. If they were the property of the mortgagor, it is admitted that the defendant was entitled to the verdict.

The plaintiff was himself examined as a witness, and testified that he purchased the goods in the spring of 1859, and paid for them. They were delivered, by his direction, to his son, Frederick F. Betts, who was of age and had recently married, at his dwelling in Jersey City, the rent of which was paid by plaintiff, and they were in the son's possession, and used by him when the mortgage was executed. He also stated that his son was at that time a clerk in his store, at a salary; that he did not himself exercise any acts of ownership over the goods, nor did he know that his son claimed to own them; that his son was not to refund the price of the goods, nothing being said about it, and there being no writing in reference to them; that he put the goods in his son's house for him to enjoy; knew his son was in debt; put the furniture in the house because he knew he was in debt, and therefore did not give it to him.

It was the instruction of the court to the jury, that there was nothing in the testimony that would enable Frederick F. Betts, the son of the plaintiff, to maintain a claim against the father, Frederick B. Betts, for the goods in question, and therefore persons claiming under the son, by mortgage or bill of sale could not maintain their title as against the plaintiff; and in pursuance of this instruction, the jury rendered a verdict for the plaintiff. The case therefore turns upon the question, whether, under the circumstances, the jury would have been warranted in finding that the goods were to be considered as a gift from the father to the son; for if they would, it was an error in the court to instruct the jury as it did.

To constitute a gift between living persons, if there be no deed, a delivery and acceptance are necessary. Both of



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Betts v. Francis.

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these requisites were complied with in this case, unless the testimony of the plaintiff himself, that he did not give his son the goods must be held to preclude the presumption from the facts, that what took place amounted to a gift. Had the father distinctly declared, at the time the goods were delivered, that his intention was not to give, but to loan them; or had the circumstances justified a presumption on the part of the son, or of others acquainted with them, that a loan, and not a gift was intended, such a conclusion might have been properly come to by the court and jury. But all the circumstances detailed in the evidence, it appears to me, justified the son and others in the conclusion that they were delivered as a gift. They were purchased by a father of ample means, and placed in the possession of his son, at a time and in the manner fairly entitled to produce that impression. That such would have been the unhesitating conclusion, had not the recent alteration of the law of evidence enabled the plaintiff to testify not only as to what he did, but as to his secret thoughts and intentions, I think cannot be doubted. It was said, in the case of *Hick v. Keats*, 4 B. & C. 71, *Eng. ed.*, that where money was advanced by a parent to a child, the presumption is that it was an advance by way of gift, and not a loan. And upon the same principle it is held, that a purchase of land in the name of a child is *prima facie* an advancement, and not a resulting trust. *Hill on Trusts*, 97, note 1, and numerous cases cited.

Ordinarily, possession of goods is the evidence of ownership, and a delivery completes the title. To permit the object for which a delivery was made to be judged of, not by the actual circumstances under which it took place, but by the secret intentions of the persons making the delivery, would be to introduce a dangerous element of confusion without any corresponding benefit. In the absence of explicit declaration, the parties interested, and those who are called upon to act on or to determine their respective rights, are compelled to judge of their intention by their acts; and this necessity occasions no material difficulty, because generally, according

## Betts v. Francis.

to the common adage, actions speak louder than words. But what security can there be if actions are to be governed by secret thoughts? If actions may be so governed, upon the same principle words also may be rendered wholly unnecessary and illusory. If the plaintiff can be allowed to turn what would otherwise be deemed a gift into a mere loan or bailment, by declaring that such was his intention, the son may in the same way defeat his acceptance. In my opinion, both parties should be considered as estopped by their acts from setting up a mere secret intention; or, in other words, whatever might have been the intention, not only the son, but those who dealt with him, ought to be protected in acting fairly and *bona fide* upon the presumption naturally arising out of the acts themselves. The broad and just principle upon which the doctrine of *estoppel in pais* rests is, that admissions which have been acted upon by others, whether they were made in express language or were implied from the open and general conduct of the party, are upon grounds of public policy and good faith, held to conclude the party making them, so that he cannot afterwards repudiate them.

In the cases of *Smith v. Montgomery*, 5 Monr. 504, and *Keene v. Macey*, 4 Bibb 35, it appears to have been held by the courts of Kentucky, that where a father put his married daughter in possession of slaves, without any other expression of his object, they still remained his property. But in the state of North Carolina it would seem that precisely the contrary doctrine has been established. *Hallowell v. Skinner*, 4 Ired. 165; *Farrel v. Perry*, 1 Hay'd 2; *Carter's Ex'rs v. Rutland*, *Ib.* 97; *Ford v. Aikin*, 4 Rich. 133.

It is obvious, however, that a question of this kind depends so much upon the usages at the place, and in reference to the kind of property in question, that these decisions, if they had coincided, instead of being directly opposed, would have been entitled to very little weight.

In my opinion the rule for a new trial should be made absolute, and the question of ownership when the mortgage was executed should be submitted to a jury with instructions,

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Callahan v. Township of Morris.

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that if the goods were delivered to the son, in the manner and under circumstances which justified him and others in the inference that they were meant to be a gift, the delivery should be regarded as having that effect, without regard to what were the secret undeclared intentions of the plaintiff.

VREDENBURGH, J., concurred.

VAN DYKE, J., concurred in ordering a new trial.

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PATRICK CALLAHAN v. THE INHABITANTS OF THE TOWNSHIP OF MORRIS.

1. The township committee have no power to authorize an overseer of roads to expend money for their repair, so as to render the township liable to an action.
2. Roads must be opened or worked for cash or upon the credit of the overseer; or if the overseer is not furnished with money he may warn out the inhabitants to work without pay.
3. The township committee are authorized to apportion the money raised for road purposes among the several districts; but they ought not to make the apportionment, and newly assign to the overseers their respective divisions until twenty days after the town meeting; so that it may be known what taxpayers have given notice that they will work out their road tax.
4. The committee ought to keep a record of their proceedings, and make all their orders in writing.

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This was a case, certified from the Circuit Court of the county of Morris, for an advisory opinion, whether the charge of Chief Justice Whelpley stated the law correctly. The facts of the case sufficiently appear in the charge and the opinion of the Supreme Court.

Argued at June term, 1862, before the CHIEF JUSTICE, and Justices HAINES, VAN DYKE, and ELMER.

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Callahan v. Township of Morris.

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\* For the plaintiff, *T. Little*.

For the defendant, *J. Vanatta*.

The charge of the Chief Justice was as follows:

This is a case involving questions of much public importance. The plaintiff's action is brought to recover of the township the sum of \$102, which he alleges he has expended upon the highway in road district No. 47, over which he was elected overseer, in the spring of 1860, by the inhabitants at their annual town meeting. This sum he claims by reason of a contract, alleged to have been made with him by the town committee in the spring of that year, and after he was elected overseer. He alleges that the committee directed him to go on and work out the same taxes on the road, as had been been worked out on it the previous year. The common law casts upon the township the burthen of making and repairing its public highways, as it does upon the county that of making and repairing bridges. But the township is not liable civilly for a neglect of the duty to anybody sustaining especial injury thereby, nor is a county, in like case, for injury arising from non-repair of bridges.

The duties are owing to the public, not individuals, and their performance is enforced by indictment, not suit by individuals.

The town committees have no common law power to bind the townships. Whatever powers they possess are derived from statutes. This case, like the one just tried, shows the importance of protecting the people against their own servants, by confining them within the strict limits of the powers conferred by law.

The modes in which roads are to be made and repaired are very carefully defined by the act on that subject. The townships may do it either by hire or labor, and they may vote on this subject once in three years, and cannot change the mode adopted in the meantime.

When the roads are maintained by labor, no specific tax



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Callahan v. Township of Morris.

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is assessed for the purpose, and the town committee is to assign the inhabitants of the township to the districts in equitable proportions, having regard to the circumstances of the inhabitants and the quality of the highways ; and the labor of the inhabitants is to be apportioned by the overseer in proportion to the other taxes.

The other mode is by hire. The townships are authorized by statute to raise money by tax for repairing roads, to be voted at their annual town meetings, *Nix. Dig.* 706, § 22 ;\* and this section enjoins it on the township to be careful to have money in hand ready to advance, sufficient for the objects and purposes specified in the act concerning roads.

The 23d section of the act requires the overseers to account for the expenditure of the money they shall receive to the town committee or the town meeting, and to pay the overplus to their successors in office. If the township is fined on indictment for non-repair, the overseer shall refund the fine. This is to be done, of course, from the money advanced to him, and not properly expended ; or if none was furnished, then for neglect to call out the inhabitants he is to pay the money.

The 42d section of the act requires the overseer, if the township neglects or refuses to raise and furnish to the overseer sufficient money, to maintain the highways in the mode prescribed for doing it by labor.

These sections and the whole act show clearly that the roads are to be worked on the cash, not the credit system, and give to the township officers no power to contract for the repair of the highways, on the credit of the township. If that were the case, there would be no limit to the amount of moneys the town committee might authorize expended on the highways.

If they may do it on credit, it is equivalent to permitting them to borrow money to an unlimited extent.

If a person elects to work out his tax, the overseer will have so much more money to turn over to his successor in office.

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\*Rev., p. 1093, § 39.

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Callahan v. Township of Morris.

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The act gives the overseer no action against the township for neglecting to raise and furnish the necessary money; in that case his duty is plain, to work the roads by labor in the mode prescribed and already stated.

Any contract which the committee may make with the overseer, to pay him a certain sum of money for his district, does not bind the township, and no action can be maintained on it against the township.

If the committee, out of money in hand, appropriate to an overseer a certain sum, and the treasurer refuses to pay it, the remedy against him or the committee to compel its payment is by *mandamus* to the treasurer or the committee; because that is their default, not that of the township. The act never intended the township should be held liable civilly for the default of the committee; if it were so, then every overseer who was dissatisfied with the action of the committee, might harass the township with suits, and expose them to the payment of unnecessary costs and expenses.

In this case the plaintiff has given no evidence to the jury, of a contract made by the committee with the plaintiff, if it had the right to make one to bind the township. The conversation between him and the chairman did not amount to a contract or appropriation. It was not the act of the committee. No vote was taken upon it. A resolution to that effect has not been shown by the minutes or by parol.

The act of the assessor in filling out his list of names with the road taxes did not bind the township.

Nor did the fact, that the taxes of residents in his district amounted to a certain sum, give him any right to sue the township for that sum, or any part of it. They belonged to the township, not to him.

The apportionment to the overseer the previous year did not affect the question, or give him a right to an equal sum for the next year.

Each committee acts for the current year as well as each overseer. A new appropriation is to be made every year.

The section on the subject of setting off road districts only

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Callahan v. Township of Morris.

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provides a mode of determining what road each overseer shall work, and defines the limits of his district. They are to remain until changed. It does not relate to the apportionment of the money to be expended on that district.

It is clear, from what I have said, and the provisions of the act, that the law contemplates no other modes of working the highways than by money furnished to the overseer, or by labor under the direction of the overseer, properly apportioned among the inhabitants. There is no intermediate mode of doing it on the credit of the township; all idea of that kind is carefully excluded by the particular provisions of the act.

That section which requires them to be worked on the labor plan, when no money is furnished, settles the question against the right to contract with the overseer.

If, however, the committee, in advance of the assessment and collection of the tax voted, apportion a particular sum to a given district, and the overseer chooses to waive his legal right to the payment of the money in advance before he begins work, and to advance the money, he may do so; and when the taxes are collected and received by the committee or their treasurer, he can call upon the committee to make payment of the appropriation, and if they refuse to do so, he may have his remedy by *mandamus* against the committee or its treasurer. They are the defaulters, and they must respond to the injured party.

If the township fail to furnish any money to the overseer, they cannot be sued for the neglect; he must proceed on the labor plan. Surely they cannot be in a worse position for the default of their agents than their own.

In no aspect of the case is the plaintiff entitled to recover, and your verdict must be for the defendants.

The opinion of the Supreme Court was delivered by

ELMER, J. The inhabitants of the several townships in this state are corporate bodies and as such capable of suing and of being sued. Formerly corporations could only be bound by a writing under their corporate seal; but in

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Callahan v. Township of Morris.

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modern times the officers and agents representing these bodies, and acting within the sphere of their duties, have power to bind them, and to impose on them contracts and obligations which may be enforced by actions at law, as in the case of individuals transacting similar business. But whether any particular officers of a corporation have this power, depends on the construction of the statutes prescribing their duties, and this is especially the case in regard to municipal corporations. It has been held that overseers of the poor may, in certain cases, enter into contracts for which the township is liable. *Saddle River v. Colfax*, 1 *Halst.* 115. And the express terms of the statute seem to render them liable to an action for the damages assessed upon the laying out of a highway. *Nix. Dig.* 712, § 61\*

In the case of *Mendham v. Losey*, Penn. 347, decided in 1808, it was held, by this court, that an action could not be maintained against a township for money expended by an overseer of the roads, for their necessary repair. There was in that case, no allegation that the township committee had in any way authorized the expenditure; but the decision was made on the ground that the overseer was not bound, and therefore not authorized to do more than to expend such money, as he should be furnished with for that purpose. Stress was properly laid upon the provision, still forming a part of the road act, whereby the townships were enjoined to be careful to have money in hand, ready to advance, sufficient for the objects and purposes specified in the acts. At that time it was somewhat doubtful whether the overseer was not liable to punishment for not keeping the road in repair, even in a case where he had no money in hand; and no provision was made whereby he had authority, in those townships which had elected to maintain their highways by hire, to call out the inhabitants and require them to work, however great the emergency.

The acts concerning roads were revised and re-enacted in 1818, and this new act was evidently framed, not to alter the construction of the old act, adopted by the Supreme Court,

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\* *Rev.*, p. 999, § 15.



## Callahan v. Township of Morris.

but in accordance therewith, and to remedy any inconvenience that might be occasioned thereby. The 36th section of this act, retained *verbatim* as the 42d section of the existing act provides, that if sufficient money is not furnished to the overseer, then it shall be, and is thereby made his duty to open, amend, and keep the highways in good order, in the same manner as is prescribed to the overseers of those townships which elect to maintain their highways by labor, that is, by warning and calling out the inhabitants to work on them. I am at a loss to imagine how the legislature could have more plainly indicated its intention to deny to the overseers of roads all power to incur expense, whereby the township should become a debtor, and liable to refund it. The plain and obvious purpose of the act was, to require all necessary expenditures on the highways to be defrayed from money kept in hand for that object, and in case the inhabitants neglect to furnish such money, to subject them to be warned out to work.

By the 12th section of the act incorporating townships, *Nix. Dig.* 835,\* the township committee have authority, and it is made their duty, "to superintend the expenditure of any moneys raised by tax for the use of the township, or which may arise from the balance of the accounts of any of the township officers;" and by the 39th section of the act concerning taxes, *Nix. Dig.* 799,† collectors and other township officers are directed to pay the moneys received, to the said committee. It thus becomes the duty of the committee to apportion the money raised for the highways among the several overseers, to be expended in their respective districts as the committee, or a majority thereof, deem expedient. As individual taxpayers have a right to work out their road tax, or a part of it, on the highways assigned to the overseer within whose limits they reside, provided they give written notice of their election to do so within twenty days after the order for raising the said money shall be passed, no proper apportionment can be made until the time for giving such notices has elapsed. Nor is there any authority vested in

\* *Rev.*, p. 1195, § 12. † *Rev.*, p. 1146, § 39.

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Callahan v. Township of Morris.

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the committee, to divert the work of any taxpayer from the district in which he resides, and assign it to another. But money may often be properly apportioned before it is in fact collected ; and although the overseer is not bound to incur the expense of opening or repairing a road by hire until he has the money in hand, yet, if he thinks proper to act upon the faith of such an appropriation, he may do so. This is often done in many parts of the state without dispute or difficulty ; and with a reasonable disposition to do right, such a course is generally safe and expedient. There is, however, not only no express power given to the committee to authorize the expenditure of money not actually voted by the town meeting, or to involve the township in any liability for expenditures on the highways, but the clearest manifestation of an intention to prohibit any such course.

Assuming that the committee did in fact apportion to the plaintiff the amount of money he claims to have expended, I am clearly of opinion that he cannot enforce his claim by action against the township. In the absence of a right of action, the money, when actually in hand, may probably be obtained by a *mandamus*, but as to this it is not necessary now to express an opinion.

There was in this case no evidence offered from which the jury had a right to find that the committee did in fact ever make any apportionment of this money. The committee is not required to keep a record of their proceedings, although it is obvious they ought to do so ; or if not, they should draw up their orders in writing, as they are expressly required to do when they assign to the overseers their divisions of the highways. There appears to have nothing more passed than loose conversations between the plaintiff and the chairman and other members of the committee, the plaintiff himself testifying, that he did not know of any resolution or vote being passed by the committee. To allow such a proceeding to have the force of a resolution binding on the committee or the township, would be contrary to every principle of evidence and exceedingly dangerous.

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Callahan v. Township of Morris.

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It was urged, for the plaintiff, that the construction of the acts above adopted, conflicts with some other parts of the road law which show a different meaning. It was said that the whole tenor of the different provisions of that law, and especially the prohibition to expend money on the roads, between the first of October and the first of April, show that the money ordered to be raised by the township meetings was intended to be expended during the current year. I am however unable to discover any such design. The positive injunction to have money in hand, implies that it was not expected to be expended until collected, which is seldom if ever effected until after the first of October. The act of 1857, 3 *Nic. Dig.* 754, § 98,\* requires only that the overseer shall not require or employ any persons to work on the roads, between the first of October and first of April, except it may be necessary to make them passable when obstructed by snow or rain. The act authorizing the town meetings to vote and raise money for opening and repairing roads, contains no restriction as to the amount or the time of using it. Difficulties may sometimes arise in carrying out the provisions of the 25th section, which authorizes taxpayers, under certain circumstances, to work out their road tax; but these can be best obviated, by the committee waiting until the precise amount thus to be worked out is ascertained before they re-assign to the overseers their divisions, and apportion to them the money ordered to be raised, and would only be increased by giving to the overseer or the committee the power to bind the township for the payment of money expended on the roads.

If the intention was that the money ordered to be raised should be expended before it was collected, it would seem to follow that the overseer should be bound to expend his proportion, whether he was willing to do so or not. This, however, was not contended for, and is clearly not the design of the law. A resolution to work the roads by hire cannot be changed for three years; this delay and the injunction to keep money on hand, united with express authority to the

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\* *Rev.* p. 1012, § 94.

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Callahan v. Township of Morris.

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overseer to warn out laborers when he is not furnished with money, show, I think, very satisfactorily, that it is the true intent and object of the statutes, that money sufficient to open and repair the roads should be voted and collected in advance, and kept always on hand, and that, if the inhabitants neglect to do this, they shall be subject to be warned out and do the work, as a part of the burthens imposed on them for the public good.

I am therefore of opinion that it should be certified to the Circuit Court—

First. That there was no evidence tending to prove the defendants liable to the plaintiff for the amount claimed, or any part thereof, which should have been submitted to the jury.

Second. That the charge of the judge was in all respects correct.

The CHIEF JUSTICE and HAINES, J., concurred.

VAN DYKE, J., (dissenting). The plaintiff in this case had been elected an overseer of the highways for district No. 47, in the township of Morris, for the year 1860. He met the township committee at their first meeting thereafter, and was directed by them, or some of them, to work out or expend on his district the same amount that had been expended by his predecessor the year before, which was \$132. He worked out and expended accordingly on his district the sum of \$102.42. He kept an account of this work and expense, and in October, of the same year, he rendered his account to the committee of the township. The committee did not at first, but afterwards objected to paying the bill, for the reason that a part of it was not due; but proposed to pay a part of it, to which they did not object. The bill not being paid, the plaintiff brought this suit against the township, in its corporate capacity, to recover the claim.

After the evidence was closed, the Chief Justice charged the jury, not only that the present plaintiff could not recover, but, if I correctly understand it, that no action of the kind could be sustained under any circumstances.



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Callahan v. Township of Morris.

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Overseers of the highways are elected under the act incorporating the townships, and the legal voters of the townships are by that act authorized to vote at their town meetings, to raise such sum or sums of money, for the opening, making, working, and repairing of roads, and keeping them in repair, as they may think necessary; which money is to be raised by a tax assessed on the inhabitants of said townships. The township committee are also elected under the provisions of that act, and this committee is not made up of mere machines, whose every possible motion is particularly presented, and outside of which they cannot go; but they are evidently intended to be elected at that time by the incorporators, so to speak, as a kind of board of directors, to manage especially the financial affairs of the corporation. They are authorized to act through a quorum, like most, if not all other boards of directors. Their election is provided for in a clause of the section, apart from those which provide for the election of other officers; and the duty is imposed upon this committee, not only of examining, inspecting, and reporting to the town meetings the accounts and vouchers of the township officers, but also *to superintend the expenditure of any money raised by tax for the use of the township*. It seems to me, therefore, that this township committee are, to some extent, the legally authorized agents of the township; and when they act within, and not outside of their powers and duties, their acts will bind the township, very much the same as the acts of other agents, duly authorized, will bind their principals.

One of the duties imposed on the township committee is to divide the township into districts, and to assign to each overseer of the highways his particular district, for the purpose of opening, clearing out, working, amending, and repairing the highways therein, and these assignments the respective overseers are bound to observe and conform to.

It is then made the duty of the several overseers to hire laborers, horses, plows, wagons, and other things necessary

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Callahan v. Township of Morris.

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to open, clear out, make, work, amend, and repair and keep in good order the highways within their respective districts.

It is then declared, in the next section, that the money necessary to defray these expenses, shall be raised in the manner prescribed in the act incorporating the townships before referred to, that is by a tax, after a vote to that effect by the inhabitants.

It appears to me, then, that when the townships have duly elected their township committees and their overseers of the highways, and all are duly qualified; and when they have also, by vote, determined to raise by tax sufficient money to make and repair the highways of the township, and when the committee has duly assigned to each overseer his particular district, and informed him of the particular amount of money that had been or would be appropriated to his district; (for it is unquestionably the right not only, but the duty of the committee in discharging their obligations, to superintend the expenditure of money, to apportion the amount raised or ordered to be raised for the purpose among the different road districts of the township,) and when the overseer has gone to work, as directed by the statute, and hired the men and teams, and wagons and carts, and made, opened, amended and repaired the roads of his district, and incurred all the expense of it himself, not exceeding the sum apportioned to his district, and has duly accounted for such work and expenditure of money to the committee; and when all other duties presented by law, if any, have been performed, and the money to defray such expenses has not within a proper time been paid or refunded to such overseer, it appears to me, I say, after all these things have been done, and the money has not been paid to him, that the township itself is liable to him for the amount, as to one of its agents and servants who has performed labor and service for it, and expended money in its behalf pursuant to its own action and request, and also in pursuance of the law of the land; for every step taken by any one in the premises is just such step as the law enjoins or recognizes.

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Callahan v. Township of Morris.

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It was remarked, in the charge, that the whole act shows clearly, that the roads are to be worked on the cash, and not on the credit system. So far as this part of the act is concerned, it seems to me directly otherwise; and from the construction that has always been given to it, the practice has been, nearly, if not quite always, to the contrary. From the nature of the thing, the work is done before the money is raised. So far as my observation extends, the committee and overseers of the highways are always elected at the same town meeting when the money is ordered to be raised. The money is not assessed and collected till late in the season, whereas the work is generally done on the roads in the early part of it, and upon the credit of the money voted to be raised at the previous town meeting, when the overseers were elected.

Of course a township would never raise money by tax in one year to pay for working the roads the next year; for the voters at the next year's town meeting might vote not to work the roads by hire, but by labor: and if the money for that purpose should be borrowed from some other source, with a view to have it ready to advance to the overseer to pay for the work before it is done, it would seem to be going somewhat on the credit system; and then, too, the inhabitants might decide at the next town meeting, that they did not want it for that purpose, but would work the road by labor.

A township newly organized, which elected its officers at their first town meeting in the spring, and at the same time voted to raise the money necessary to work the roads, could not possibly raise the money by tax to do so before the work should be done, unless it should be delayed until December.

All of the sections of the act touching this subject, up to the 37th, go on the presumption that the roads are to be worked by hire, and all the regulations and provisions of the act, thus far, are based on this assumption; but by the 37th section, the inhabitants of the township are authorized to determine, by vote at their annual town meeting, whether

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Callahan v. Township of Morris.

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they will work their roads by hire or by labor. If they determine to do it by hire, then the mode of doing it is already provided for. If they decide to do it by labor, then another mode of proceeding is to be adopted. This latter course the townships *may* take if they so determine; but if they do not in fact, determine to pursue that course, the conclusion of law is that they determine to work by hire, unless they refuse or omit to order the raising of the money for that purpose.

If the township elects and determines to work by hire, but fails to raise, or order raised, the money with which to do it, in that case the overseers are directed to proceed as though the determination had been to work by labor, and to warn and call out the inhabitants for that purpose. But this can only occur, when the township has determined to work by hire, but has wholly omitted to make any provision by vote, for the raising of any money for that purpose; for if the township votes and determines to work the roads by hire, and at the same meeting votes and determines to raise by tax the money necessary to do it with, the overseer has then no right to call out the inhabitants, and make them liable to the penalties of disobedience. He is then authorized and required to consider that the roads are to be worked by hire; and if his district be properly assigned to him, and if he be apprized by the committee of the amount of money that will be or has been apportioned to his district, out of the money so ordered to be raised by the township, he has a right to go on and expend that amount in repairing, &c., the roads of his district; and if the amount, not being above the proper apportionment, be afterwards improperly withheld from him, he can, I think, maintain his action for it against the township.

It is said, however, that the committee have no right to make such a contract with the overseer. They do not make any contract. It is not necessary that they should do so. The right of action does not arise out of a contract but out of the law, when all of its directions have been complied with. It is the duty of the committee to assign the districts,



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Callahan v. Township of Morris.

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and, I think, to apportion the money properly to or among them. It is not necessary that they should go any further, unless it be simply to apprise the overseers of these facts. If the township did not vote to raise the money for this purpose, no contract by the committee in the case could make it liable. This the overseer is bound to know, for he knows, or is bound to know, that if the township does not make provision for the raising of the money, he cannot undertake to work the roads by hire, for in that case his duty is to take the other course, and call out the inhabitants.

It is also said that the proper remedy in this case, if one exists, is by *mandamus* against the committee or its treasurer for not paying over the money. I am aware that this *mandamus* proceeding has become quite a favorite one of late. I recollect that it was used in one case as a substitute for the action of ejectment, and in these days of non-imprisonment and family exemptions, and debts and difficulties in collecting, I should not wonder if it should be generally resorted to for the collection of bad debts. To collect a debt would certainly be its character, if used in a case like this. Be that as it may, I certainly think it should not be resorted to in cases like the present; for, in the first place, here is a dispute, as there may be in every such case, as to what amount is actually due, which is not properly the office of a *mandamus* to determine. And then it may be, that an overseer may be deprived of his money, without any fault on the part of the committee or their treasurer. The committee do not raise the money when ordered to be raised by the township; this is done by other agents of the township, over whom the committee have no control.

If the proceeding by *mandamus* might lie in such case, it is not a proceeding of right but of *discretion*; and while a party might reasonably calculate on what the law would do for him, he might be quite at a loss to tell where the discretion of a court might land him.

Again, while a *mandamus* might have the effect to punish some delinquent official, it might be wholly powerless in get-

## Callahan v. Township of Morris.

ting for the plaintiff his money. He should not therefore be shut up to a remedy like this.

If it be admitted that a *mandamus* might be used in such cases against the agents, I do not see how it can, nor why it should, deprive the party from his usual remedy against the principals for work and labor which he has performed, and money which he has paid out for them, according to their different votes, and in strict pursuance of the law, as one of their appointed and lawful servants.

The evidence in the case before us, is not as full and clear as it might have been perhaps; but I think that certain facts may be considered as either admitted, or so far proved as that the jury should have passed upon them.

1. That the township committee as well as the plaintiff, had been duly elected at the town meeting next preceding the doing of the work, and had entered on the duties of their respective offices, and that at the same town meeting, the voters duly voted to raise money to work and repair the roads.

2. That the plaintiff's district had been duly assigned to him by the committee.

3. That the committee had determined that a portion of the money so ordered to be raised was to be appropriated to the plaintiff's district, and so informed him.

4. That he accordingly went to work, and expended on the roads of his district the amount named, or some part of it.

These facts show that the plaintiff was entitled to recover something, and the jury should have been permitted to ascertain what it was.

Our roads are badly enough worked now; but if every overseer is to understand, that unless he gets his pay in advance he can never recover it, except from some delinquent agent, by a proceeding which he has never before heard of, we shall be far worse off than we are now.

I think, therefore, that the Circuit Court of the county of Morris should be advised to set this verdict aside, and grant a new trial.

The charge of the CHIEF JUSTICE sustained.

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State v. Council of Elizabeth.

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THE STATE, MOSES M. WOODRUFF, PROSECUTOR, v. THE  
CITY COUNCIL OF ELIZABETH.

Where a city charter authorizes street improvements to be made, or work done, only on the application in writing to the council, of a majority of the resident owners of property lying along such street, it should appear in the return to the *certiorari* bringing up for review the proceedings of the city council, that the application is signed by a majority of the resident owners; the burthen of proof is on the defendants, and such fact, being a jurisdictional one, must appear on the face of their proceedings.

On *certiorari*. In the matter of laying out a public street in the city of Elizabeth.

For the prosecutor, *B. Williamson*.

For the defendant, ——— ———.

The opinion of the court was delivered by

BROWN, J. This *certiorari* brings up for review the proceedings of the city council of Elizabeth in the laying out of a street extending Grand street. The first reason assigned for setting aside the proceedings is, that there was no petition for the road such as the charter required, to which the defendant in *certiorari* replies, that no petition was required by the charter.

It is enacted, by the second section of a supplement to the charter, passed March 15th, 1859, that the city council may lay out and open any street, road, highway, alley, or park, in any part of the city, and cause to be vacated any already laid out or to be hereafter laid out, and cause to be graded, gravelled, paved, or macadamized, and cause to be constructed sewers or drains, &c. In case lands are taken, compensation is to be made to the owners, and in case of improvements, the expenses are to be paid by the owners. To this section there is a proviso, that all or any of the aforesaid improvements shall be made or work done, only on the application in

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State v. Council of Elizabeth.

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writing, to said council, of a majority of the resident owners of property lying along any street or streets, or sections thereof, on which such improvement is to be made or work done. It is argued, that the word improvement does not include a street *to be* opened; that the proviso refers only to improvements *on* a street already made. There is much plausibility, and perhaps good sense, in this verbal criticism of the statute, but it is not always by verbal criticism, that the true meaning of a statute and the true intent of the legislature can be reached. The question is, whether the legislature intended that streets could *only* be sewered, graded, and gravelled or paved, on the application of a majority of the resident owners, but could be laid out anywhere in the city, (excepting through burial grounds, excluded in another proviso,) or vacated anywhere, against the protest of all the owners on each side of it. Such a construction should be not merely probable but necessary. One of the highest municipal powers is the taking lands for highways against the consent of the owners. The legislature should not be taken to intend it, when lesser power can only be exercised with their consent, or the consent of a majority of them, unless the act admits of no other reasonable construction. Upon the first reading of this proviso, "that all or any of the aforesaid improvements shall be made only," &c., the impression made upon the reader is certainly, that the whole of the powers given over streets are referred to; and when the attention is directed to the alternative words, "or work done," the impression grows stronger. The doubt is raised only when it is suggested, that no improvement can be made on a street, or work done on a street, until it has become a street; and yet, notwithstanding the difficulty of interpretation arising from these words, the first impression of the intent of the law will remain unshaken. The proviso says "*all*" and every reason for the rule, applicable to one kind of improvement or work applies to all. I have no difficulty in reading this proviso as applicable not only to work to be done to streets actually laid out, but to those which are proposed



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State v. Council of Elizabeth.

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to be laid out; and am strengthened in so doing by the next proviso, in the same section, which is, "that before the council shall determine that such improvement is to be made, or work done, they shall give notice, &c., briefly describing such work, road, alley, park, or improvement." *Such* improvement, in this, refers to the previous proviso, and means the same thing in both. In the latter, by the description to be given in the notice, it appears that it may be a work, a road, an alley, a park, or an improvement. It is not here improvement to a road, or on a road, but road or improvement, of which notice is to be given.

The defect in the petition relied upon is, that but one of the owners of the land in the route of the road has signed it, when the proviso requires that a majority of such owners should apply. To this it is answered, that the act requires only a majority of the resident owners, and that it does not appear that there is more than one resident owner.

The reply assumes that the burthen of proof is upon the prosecutor. This is a mistake. Inferior jurisdictions have upon them the burthen of showing their acts to be within the authority granted to them. What are called jurisdictional facts must appear on the face of their proceedings or otherwise. It does not appear that there is but one resident land owner in the route of this road. The contrary appears from the report of the special committee, to whom was referred the matter of opening the street. They report that they are unable to agree with all the owners of property lying along said improvement: one of the owners, Mr. Green, being a non-resident, and another, Doct. Woodruff, being absent from the city. Doct. Woodruff, it seems from this, is a resident, and he did not sign the petition. The petition is signed by nineteen persons, and the street committee report, that a majority of the resident owners lying along the proposed improvement have petitioned. This cannot be true if Doct. Woodruff is a resident owner, and Mr. Green the only non-resident owner, as seems to be the fact from the report of the special committee. This in-

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Ordinary v. Cooley.

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consistency should be explained by the council, otherwise the facts stated in the proceedings must be taken most strongly against their jurisdiction. The explanation is found in the brief of their counsel. Eighteen of the petitioners own property along Grand street, but not upon the proposed extension of it. It is contended that these eighteen are owners along the line of the improvement; but this is not so. Grand street now terminates at Chilton street, and the new street begins there. The improvement extends Grand street, but Grand street is not a part of the improvement.

The prosecutor is right in his position, that the petition is not so signed as to give the council jurisdiction, and for this reason the proceedings should be set aside. It is not therefore necessary to examine the other reasons assigned.

Proceedings set aside.

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## THE ORDINARY v. JOHN B. COOLEY ET AL.

1. A bond, by an executor or administrator, to the Ordinary of the state, which varies from the form prescribed by the statute, if voluntarily given, and not made void by statute, is good.
  2. When, by the condition of such bond, the executor or administrator is required to render a just and true account concerning the sale, an assignment of a breach of such condition, that he had not rendered a just and true account of his administration of the moneys arising from the sale, is bad on demurrer.
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In debt on administration bond. Demurrer to declaration.

For the plaintiff, *A. G. Richey* and *A. Wurts*.

For the defendants, *G. A. Allen* and *M. Beasley*.

The opinion of the court was delivered by the

CHIEF JUSTICE. The condition of the bond declared on is, that whereas John B. Cooley, administrator of the estate of Samuel Cooley, deceased, by an order of the Orphans Court of the county of Hunterdon, held on the 16th day of

## Ordinary v. Cooley.

November last, was directed to sell the real estate of the said Samuel Cooley, deceased; if the said John B. Cooley shall comply with the said order agreeably to law concerning the same, and shall render a just and true account concerning the same, then the obligation to be void, otherwise to remain in full force and virtue.

The breach assigned is, that Cooley, on the 3d day of February, 1858, did sell the real estate, and received therefor \$1790.10, yet that he hath not complied with the order according to law, and that he did not well and truly administer the moneys, which arose from the sales of the land by virtue of said order, and that he did not and hath not rendered a just and true account concerning the same of his said administration, within the time required by law; and the surplus money which was found remaining upon the account of the said John B. Cooley, administrator as aforesaid, (the same having been first allowed by the Prerogative Court of the state of New Jersey) he did not and hath not distributed and paid, unto such persons as were and are by law entitled to receive the same, but hath, &c.

To this declaration there is a general demurrer.

It is insisted that the bond is void, because it does not conform to the statute (*N.J. Dig.* 765, § 22,\*) which requires the condition of the bond to be in form following: The condition of this obligation is such, that if the above bound A. B. (executor, &c., administrator, &c.,) shall well and truly administer the moneys arising from the sale of any lands, tenements, or real estate of the said C. D., directed by the order of the Orphans Court of the county of M. to be sold according to law; and further, do make, or cause to be made, a just and true account of his administration within twelve months from the date of the above obligation, and the surplus of money which shall be found remaining upon the account of such sale or sales (the same being first examined and allowed of by the judges of the Orphans Court of the county, or other competent authority,) shall distribute and

\**Rev.*, p. 768, § 75.

## Ordinary v. Cooley.

pay unto such person or persons, respectively, as is, are, or shall be by law entitled to receive the same, then, &c.

It is certainly true that the bond altogether varies from the form prescribed; nevertheless it appears, by the record, to have been voluntarily given, and is not made void by statute. Such bonds have been uniformly held good in this court when they require nothing more than the law requires. *Woolwich v. Forrest, Penn.* 115; *The Mayor, &c., of Hoboken v. Harrison and others, ante* 73.

The remaining question is, whether there is a good assignment of breaches.

It was urged that there was but one assignment of breaches, to wit, that he had not complied with the order of the Orphans Court, according to law; that what appear to be two breaches are but in fact specifications under this one.

I do not so regard them. What immediately follows is doubtless a specification under the last sentence of noncompliance with the order. The other is an independent breach. The first is no breach of the condition requiring the administrator to comply with the order of the court agreeably to law; that does not require him well and truly to administer, &c., the moneys received from the sale. The declaration states expressly that he did sell. That is a full compliance with the order to sell agreeably to law; nothing but that is required by the first branch of the condition.

The second branch of the condition requires the administrator to render a just and true account concerning the same. Concerning the same means undoubtedly concerning the sale. He is to render before the proper tribunal a just and true account concerning the sale. When that account is to be rendered, does not appear by the condition. The law requires such an account to be rendered at the next term after sale.

There is no breach assigned of the condition to render a just and true account concerning the same.

The one assigned is, that he did not render a just and true account concerning the same of his administration. He



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Yawger v. Manning.

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agreed to render an account concerning the sale. The complaint is, that he did not render a true account of his administration of the moneys arising from the sale.

An assignment that he had not rendered a just and true account concerning the sale within the time required by law would have been good. But the pleader was not content with that; he coupled to the account required by the condition one not required by it, and so vitiated his whole breach. An assignment charging that he did not do what the bond did not require is manifestly bad.

This is an action to charge sureties, and not the administrator only, and is upon a bond entirely variant from the form prescribed, which has been held to be good only because it was voluntary. We have no right, under such circumstances, to say that the parties meant a bond with the statutory condition; the presumption is directly the other way.

To extend such a condition by a violent construction would not only be illegal, but grossly unjust.

The bond is to have just such a construction, and none other, as if the statute had prescribed no form, and the parties had invented their own security. That is precisely what they have done.

Judgment for the defendants.

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PETER YAWGER v. JAMES MANNING AND OTHERS.

1. In an action of trespass in a justice's court, a plea that there was a road across the *locus in quo*, to which the defendants had a title in common with all other citizens of this state, and that they entered within the limits of this road, is not a plea of title to any real estate. Such plea means nothing more than that the defendants had right, in common with all citizens, to a road across the *locus in quo*, which is merely a right of highway.
2. The defendants tendering the plea as a plea of title, are not thereby

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Yawger v. Manning.

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estopped from denying that it was such plea, unless on the ground of wilful misrepresentation by defendants, on which the plaintiff was induced to act to his injury.

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In trespass. On motion to strike out pleas.

For the plaintiff, *J. N. Voorhees*.

For the defendants, *J. T. Bird*.

The opinion of the court was delivered by

BROWN, J. This action was commenced before a justice of the peace. The defendants pleaded that there was a road across the *locus in quo*, to which they had a title in common with all other citizens of this state, and that they entered within the limits of this road. The defendants also gave a title bond, as required by the statute, and thereupon the plaintiff brought suit in this court. The defendants have pleaded here—1st, the general issue; 2d, that there was a common highway over said close, and that the defendants, having occasion to use the highway, entered on the same, and filled up the ditch, which was an obstruction to its use; 3d, that Manning, one of the defendants, was an overseer of the highways, and that this part of the highway over the close in question was lawfully assigned to him; and that he and the other defendants, by his order, entered to repair and remove obstructions from the same, and to that end necessarily did the acts complained of. These pleas are not pleas of title. The questions arising upon them could have been tried before the justice. A right to use a highway is not a title to real estate.

The plaintiff moves to strike them out, because he contends the defendants, having pleaded title below, are bound to plead title here, pursuant to the 40th section of the act constituting courts for the trial of small causes, and the effect given to that and the two succeeding sections by this court. The language of the 40th section is, "that when, in any action brought by virtue of this act, the defendant shall, as a justi-

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Yawger v. Manning.

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fication, plead title to any real estate in himself, or another under whom he acted or entered, such defendant shall commit such plea to writing, &c., and thereupon it shall be lawful for the plaintiff to commence his action in this court, and recover costs," &c.

The success of the plaintiff's motion depends upon the question, whether the defendants did plead title in the justice's court to any real estate. It is only *when* that occurs that the sections of the small cause act and the decisions of this court upon the effect of them, referred to above, are brought into action. The plea is, that there was a road over and across the close mentioned and described in the plaintiff's state of demand, to which these defendants had a title in common with all other citizens in this state, and that they entered within its limits, &c., as they lawfully might, &c.

If this meant that the defendants had a right of way over the close by grant, or twenty years' adverse use of it, it would be a plea of title. 1 *Harr. R.* 226, *Randolph v. Montfort*. A right of way is real estate, an incorporeal hereditament. But this plea cannot be understood as meaning such a right: they allege it to be a title to a road. This, by itself, might leave a doubt. The construction in favor of its being a plea of title should be taken most strongly against the pleader. If it be not such, he has misled the justice and the plaintiff. But when the pleader adds the words, in common with all the other citizens of this state, he excludes the idea of its being a way originating by grant, or use, or any estate or individual right. Taking the whole together, it means no more than a right, in common with all citizens of the state, to a road across the *locus in quo*, and this is nothing less or more than a right of highway. It was suggested, upon the argument, that the defendants were estopped to deny that their plea was a plea of title by their action in the justice's court, in tendering the plea as such, and giving bond reciting that they had pleaded title to the land as a justification.

In an action on the bond, the defendants would be estopped to deny the facts recited in it; but the recital, besides

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State v. Johnson.

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stating the fact of a plea of title, shows also what the plea was, so that the bond proves no more than the plea. Tendering the plea as a plea of title if an estoppel, must be such *in pais*, and on the ground of wilful misrepresentation by defendants, on which plaintiff was induced to act to his injury. There is no evidence of wilful misconduct. So far as appears, the taking this plea as a plea of title was a mistake of law by the plaintiff, as well as the defendants and the justice.

Motion denied.

CITED in *Kuhl v. Mayor of Jersey City*, 8 C. E. Gr. 87.

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## THE STATE v. JOEL M. JOHNSON.

1. On an indictment for rape, the defendant may be convicted of an assault, and found not guilty of the rape.
  2. Under the laws of this state, a party indicted for a crime may be convicted of any offence of a lower degree, provided such lower offence is included within the description in the indictment, without regard to the question whether it was or was not technically a felony.
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## On indictment for rape.

The defendant having been indicted in the Oyer and Terminer of the county of Passaic, and on the trial acquitted of rape, and convicted of an assault, the question was reserved for the advisory opinion of this court, whether judgment could be entered on the verdict.

For the state, *H. A. Williams*.

For the defendant, *J. S. Barkalow* and *S. Tuttle*.

CHIEF JUSTICE. At the Oyer, the defendant was convicted of an assault upon an indictment for rape, and found not guilty of the rape.

The question was reserved to be argued at bar whether such a conviction was lawful. The case was argued at the



## State v. Johnson.

last term of the court, and the Oyer advised to proceed to judgment.

We think the conviction was proper. The indictment charged an assault in due form.

The general rule seems well settled, that it is not necessary to prove all the allegations of an indictment, where the evidence makes out a substantive offence of a lesser grade; that the defendant may be convicted of that, if charged in the indictment, although as an ingredient in the greater offence. *Arch. Crim. Pl.* 106; *Whart. Cr. Law* 226; 1 *Greenl. on Ev.*, § 680; 1 *Chitty's Cr. Law* 637.

Upon an indictment for burglariously stealing, the prisoner may be convicted of the theft, and acquitted of the nocturnal entry. 1 *Leach* 36, 88; 2 *East's P. C.* 516; 1 *Hale* 559.

On an indictment for murder, the defendant may be convicted of manslaughter. *Co. Litt.* 282, *a*; 2 *Hale* 302; *Barley's case*, *Cro. Eliz.* 296.

On an indictment for grand larceny, there may be a conviction for petit larceny. 2 *Hale* 302; *People v. White*, 22 *Wend.* 176; *People v. Jackson*, 2 *Hill* 92.

The doctrine has been uniformly held by the English courts, where the crime proved has been of the same general character as that charged. It was said that an indictment for a felony would not support a conviction for a misdemeanor. 1 *Arch. Cr. Pr.* 166; 2 *Stra.* 1133; 1 *Leach* 12.

The only reason given for this exception was, that on an indictment for a felony, the prisoner would not have the benefit of a copy of the indictment, a special jury, and of making full defence by counsel. *Stra. Rep.* 1137; *Cro. Car.* 332; 1 *Hawk.*, *b.* 2, *c.* 47, 96.

By statute 7 *Wm.* 4, and 1 *Vict. c.* 85, § 11, the law is altered so that, on the trial of an indictment for any felony which includes an assault, the jury may convict of an assault only.

There are many conclusive reasons why this conviction should be sustained.

The original rule, that felony and misdemeanor could not

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State v. Johnson.

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be joined, had its origin in the diversity of the mode of proceeding in the two cases, giving greater privileges on the trial for the lesser offence. That is not the case under our law, but the reverse.

By our statute, the offence of rape at common law is not a felony, but a high misdemeanor. *Nix. Dig.* 162, § 10.\*

The technical reason for the non-joinder of rape and assault is thus removed.

The interests of public justice require that when an offence, clearly and distinctly charged in an indictment, is made out by the evidence, that the defendant should not, for a purely artificial reason having now no foundation except in obsolete and repealed laws, be acquitted.

When the offence is charged and proved, there can be no surprise upon the defendant, and instead of losing his privileges by a trial for the minor offence, they are enlarged upon an indictment for the minor offence, or at least remain the same.

There has been some contrariety of decision on this point in the courts of this country. It is not necessary to review the cases. They cannot be reconciled. We are at liberty to adopt a convenient rule of practice on this subject; one which will best promote the public good, and at the same time deprive parties indicted of no substantial right.

The rule enunciated in the New York cases cited is convenient, and violates no rule of our criminal law.

ELMER, J. Notwithstanding the general doctrine of the common law, that upon an indictment charging a felony the defendant could not be convicted of a misdemeanor, it is doubtful whether this rule was applied to the case of rape. *Harman v. Comm.*, 12 *Serg. & R.* 71; *Cook v. State*, 4 *Zab.* 486; *Rex v. Dawson*, 3 *Stark.* 62.

However this may have been, I am satisfied that, under the existing statutes and practice in New Jersey, a party indicted for a crime may be convicted of any offence of a lower degree, provided such lower offence is included within the

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\* *Rev.*, p. 241, § 80.

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Telfer v. Northern Railroad Co.

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description in the indictment, without regard to the question whether it is or is not technically a felony. Our statutes describe crimes of all descriptions as high misdemeanors, or misdemeanors only, many of the latter being of the class of felonies. The use of the word felony, indeed, seems to be studiously avoided. Peremptory challenges are allowed only in certain enumerated cases, and the mode of trial is substantially the same in all. The court will undoubtedly exercise a discretion, governed very much by the nature of the offence, in regard to the personal appearance of the defendant and his committal into actual custody during the progress of the trial; and it may be that in determining what are still offences of an indictable nature at common law, and the power of arrest, regard must be had to the common law distinction between felonies and misdemeanors; but so far as the trial is concerned, there is no longer any reason for it. The ancient rules in regard to trials, even in capital cases, have been modified in this state, so that now the prisoner is allowed to appear and plead by attorney, and he is allowed to be fully defended by counsel in all cases. *Donnelly v. State*, 2 *Dutcher* 468. I am therefore of opinion that judgment should be rendered for the state.

Judgment for the state.

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DAVID TELFER, ADMINISTRATOR OF DAVID TELFER, JR.,  
v. THE NORTHERN RAILROAD COMPANY.

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1. When a railroad company is sued for damages sustained by a collision on their road, induced by the negligence of the company or their agents, and it appears that the party injured was himself guilty of such negligence or want of reasonable care as contributed to the doing of the injury, there can be no recovery.
2. "In crossing ordinary roads, caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads, it is exacted to avoid being run over yourself. In the former case the blame attaches *prima facie* to the party doing the injury; in the latter, it attaches, in the first instance, to the party obstructing the track."—*Per VAN DYKE, J.*

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Telfer v. Northern Railroad Co.

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3. In an action under the statute to recover damages for death caused by negligence, only the pecuniary loss or injury sustained by the plaintiff can be allowed ; and in estimating that, the chances of health and life are to be considered in connection with the value of services.
  4. The reciprocal duties of railway companies and persons crossing their roads discussed.
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This suit was brought by the plaintiff, as administrator of his son, David Telfer, jun., against the defendants, under the act of March 3d, 1848, for the recovery of damages sustained by the death of his son, which was occasioned, as he alleged, by the wrongful act, neglect, or default of the defendants.

The plaintiff declared, in substance, that on the 10th December, 1859, defendants were owners of a railroad, extending from the New York line, in Bergen county, to Jersey City, in the county of Hudson, which crossed several highways in the county of Bergen, and that it crossed a certain highway in North Bergen, where the old Secaucus road and the New York and Paterson plank road form a junction ; that the crossing at this point was dangerous, as persons going in a westerly direction along the Secaucus road, in approaching the railroad track, were prevented from seeing it on account of certain houses and outhouses there situate, and by reason of a curve in the Secaucus road near that point ; that the approach to said track, on the Secaucus road, by passengers, carriages, &c., could only have been rendered safe and prudent by the defendants providing flagmen, or other servants, to be stationed at the railroad crossing to give warning to persons approaching or passing thereon, and by defendants approaching to it slowly and with caution, and by ringing a bell or sounding a whistle ; that on that day the said David Telfer, jun., was riding in a wagon on the old Secaucus road, and approaching said crossing, and there got upon the track of the railroad at the junction and crossing aforesaid, as he lawfully might and without any negligence on his part, when the defendants, with their engines, cars, &c., propelled by steam, approached and came upon the



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Telfer v. Northern Railroad Co.

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said crossing with reckless speed, at the rate of fifty miles an hour, without having any flagmen or servants to warn persons of their approach, and without ringing any bell or blowing any whistle, by reason of all which the wagon of the said David Telfer, jun., was struck and crushed, and the said David Telfer, jun., so injured that he died ; that plaintiff was obliged to expend large sums of money for his burial, and as father and next of kin of the said David Telfer, jun., sustained great loss and damage, to the sum of \$10,000 in all ; whereby, and by force of the statute in such case provided, an action has accrued to him, as administrator as aforesaid, for the exclusive benefit of the plaintiff, who is next of kin to said deceased, to demand and have, &c.

A suit was also brought for loss sustained by the death of William Telfer, another son of the plaintiff, at the same time, in which a like declaration was filed. Issue was joined by the defendants in both cases, and they were, by consent, tried together at the Hudson Circuit, when the jury rendered a verdict for the plaintiff in both cases, assessing damages in one case at \$936, and in the other at \$1056.

A rule was obtained by the defendants, on the coming in of the *postea*, that the plaintiff show cause why the verdict should not be set aside, and a new trial granted.

The principal reasons relied on were—1st, that the evidence did not show any wrongful act or negligence of the defendants, and that it did show a want of care on the part of the persons who were killed by the collision ; 2d, that if the plaintiff was entitled to recover, the damages given by the jury were excessive.

So much of the evidence as is necessary to a clear understanding of the cases is detailed in the opinions delivered

For the rule, *A. O. Zabriskie*.

Contra, *F. B. Ogden* and *I. W. Scudder*.

CHIEF JUSTICE. The plaintiff's two sons were killed by

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Telfer v. Northern Railroad Co.

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a collision between the wagon which they were driving and the cars of the defendants, at a crossing of their railroad and the Secaucus road. The wagon was overturned, and they thrown out violently, injuring them so seriously that in a short time they both died.

These actions were for negligence of the agents of the defendants in the charge of the train, in consequence of which it is alleged the collision occurred, to recover damages for the pecuniary loss sustained by the father in the death of his sons.

At the trial, the right to recover was rested on various grounds.

1. That the speed of the train was unlawful as well as unusual.

2. That the crossing was so dangerous as to require a flagman, and that none had been provided.

3. That with proper care on the part of the defendants, the collision might have been avoided.

4. That the collision was caused by the neglect of the engineer to blow the whistle or ring the bell, as required by law.

The defendants, while denying these alleged neglects, insisted that the negligence of the boys contributed to produce the collision, if it was not the sole cause of it.

The verdict was for the plaintiff in each case, and gave for the death of David \$936, of William \$1056.

The defendants ask to have the verdicts set aside and new trials.

1. Because the verdicts are excessive in amount.

2. Because they ought to have been for the defendants upon the evidence.

The verdicts cannot be supported upon the evidence upon any point in the case.

The speed of the train at the time of the collision was neither extraordinary nor unlawful. It could not have exceeded twenty miles an hour.

I agree to the judge's charge, that the jury could not lawfully rest a verdict for the plaintiff on that ground.

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Telfer v. Northern Railroad Co.

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Although the question, whether the speed was excessive, was one of fact for the jury, yet they could not arbitrarily declare it so. No witness testified that the speed of the train was excessive; that it was unsafe to run at that speed.

The legislature have not seen fit to limit the speed of locomotives, and trains drawn by them, while expressly authorizing their use. I know of no limit to the speed which they are entitled to make, except that fixed by a careful regard to the safety of the trains and the passengers conveyed by them. The public interest requires in this mode of transportation the maintenance of a high speed, and the legislature have expressly sanctioned it by authorizing the use of engines, whose object we all know is to attain and preserve this high speed.

To hold that railway trains must run at such rates as to enable them to avoid collisions, by stopping the trains at the approach of ordinary vehicles to crossings, would deprive them of that upon which their usefulness and value almost entirely depend—their power almost to annihilate time and space by their rapid movements.

Until the legislature or some lawful municipal authority prescribes a contrary rule, locomotive engines may run upon the track, at such rate of speed as the exigencies of railroad companies require, and may preserve this speed at the usual crossings, notwithstanding the approach of other vehicles to the crossing upon the common highway; and under ordinary circumstances, it will not be considered either gross or ordinary negligence, or what is called want of ordinary care.

To this general rule there may be many exceptions. If the engineer, when approaching a crossing, should perceive upon the railroad track a flock of cattle crossing, or a single carriage even, he would be required, in the exercise of ordinary care, to do all in his power to avoid a collision; and failing to do so, the company would be liable for the consequences of his negligence.

So it would doubtless be held want of ordinary care to drive a locomotive across the streets of a populous town or

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Telfer v. Northern Railroad Co.

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neighborhood at a rate of speed perfectly justifiable when passing over an ordinary highway running through a sparsely settled neighborhood.

The care to be used in avoiding collisions with ordinary vehicles upon the public highways, must be in proportion to the danger incident to the particular locality. The nature of this locality will presently be seen. Nor did the evidence justify a verdict founded upon a failure to provide a flagman at the crossing.

The opinion of unskilled witnesses, unsupported by sufficient reasons of the necessity of a flagman at this crossing, was not sufficient to support the verdicts. Whether there was such necessity or not, although a proper matter for the decision of the jury, yet if the jury found a verdict without evidence on this point, or against the evidence, it should not be permitted to stand. The place was a very sparsely populated neighborhood, but few dwellings, not half a dozen, near the crossing. It was of so little importance as not to be a regular stopping place, only a flag station.

At the crossing, the railroad and the common road were about the same grade. The railroad did not at this point suddenly emerge from a deep cut, so as to cut off a view of the cars until the wagon was upon the track.

The approaching train could be seen for half a mile upon the track before reaching the crossing.

At a point one hundred and seventy feet from the track, on the road down which the boys were coming, the approaching train could be seen when at a distance of two hundred and sixty feet.

There were here no trains playing back and forth, as is the case near stations in cities and towns, calculated to deceive the boys when approaching. The only source of danger was the regular and occasional trains of the company, which upon this road were infrequent. The hotel of McCollum was the only considerable building near.

There was no evidence that the number of passengers along the highway was so great at this point as to render a



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Telfer v. Northern Railroad Co.

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flagman necessary, as in the crowded streets of a city where the passing must be constant, and it would be highly inconvenient for each carriage to come to a stand, to see whether trains were approaching.

No municipal or legislative requirement rendered it obligatory upon the company to have a flagman there. In the absence of such requirement, it should have appeared that there was something to distinguish this from ordinary crossings, some peculiarity in the character of the ground, which so plainly indicated the necessity of a flagman as to leave no doubt of the obligation of the company to put one there. The company should not have been held liable on this ground, unless for the neglect of a very manifest duty; one which the company could not have failed to perceive without great carelessness.

There is no pretence that such was the case there. To sustain a verdict upon such evidence to make out the necessity of gates or a flag, would impose upon every railroad company the necessity of keeping flagmen or gates at almost every crossing, and almost amount to a prohibition of such roads as that of the defendants, sustained by a very limited number of passengers.

The topography of the place clearly shows that persons about to cross may, with ordinary care, always ascertain when a train is approaching, and thus avoid a collision.

Whether the whistle was blown or bell rung upon the approaching engine, is immaterial, if the boys knew, or with ordinary caution might have known in time to avoid the collision, that the train was approaching; but if it were material, I think the decided weight of the evidence, indeed all the reliable evidence in the cause, shows that the whistle was blown and bell rung as required.

The negative testimony of the occupants of the bar-room at the time of the accident, that they did not hear it, is not entitled to much weight; accustomed as they were to the sound, it would be strange if they recollected hearing it.

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Telfer v. Northern Railroad Co.

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The testimony of one credible witness, that he did hear it, is far more reliable, and should outweigh theirs.

Nor does the evidence show any ground for the conclusion that there was a neglect of proper means to avoid the collision, as soon as its danger became apparent. Every means was taken to arrest the progress of the train, when the engineer saw the attempt to cross in front of it.

Where common highways and railroads intersect, the trains have the right of way, as against ordinary carriages; it is the duty of the latter to keep out of the way of the former.

Although the engineer saw the boys approaching the crossing, while yet at such a distance as not to indicate their ignorance of the coming train, it was his right to suppose they did not mean to attempt to cross before the train; and if he acted upon that impression, it was not negligence or want of ordinary caution on his part, although the supposition proved to be groundless.

The evidence shows that everything was done to arrest the train as soon as a collision seemed probable. The brakes were applied, and the engine reversed, but it was too late. The collision took place, and the boys were killed.

It was not pretended, at the trial or here, that the train might have been stopped sooner, so as to avoid the collision, or that the failure to do so arose from the want of proper brakes, or men to use them.

Assuming, therefore, the right of the train to pass that crossing at its usual speed, or any speed safe for itself when there seemed to be no danger of a collision, I cannot see of what negligence the persons in charge were guilty. There was no want of caution on the part of the conductor, no recklessness of danger. The train was, both before and after it was perceived the boys intended to cross in front of it, managed with care and judgment by all concerned. They did everything incumbent upon them, and omitted no precaution to avoid the accident.

Their conduct was not the cause of the accident, and did

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Telfer v. Northern Railroad Co.

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not even contribute to produce it. It was undoubtedly caused by the unexpected conduct of the boys in attempting to cross in front, and because their intention to do so was not manifest until too late to stop the train, and let them pass. But I think the evidence was almost conclusive, either that the boys drove upon the crossing after they saw the approaching train, or might, with ordinary care and prudence, have seen it. The evidence on this point is both positive as well as circumstantial.

The accident occurred about the usual time for the passage of the cars, a few minutes later, in broad daylight, at ten o'clock in the forenoon. The boys knew this to be the usual time to expect them; they passed there almost every day; they should have been on the lookout. They were thoroughly conversant with the topography of the place; they must have known how far the cars could be seen, and what obstacles were in the way. They either did not stop to listen, or if they did, heard the train, and drove on. Many others farther off than they, whose opportunities were not so good as theirs, heard it; if they did not, it was their own fault. If they did stop, as almost all the witnesses say they did, about forty feet from the track, and if they were, as the testimony shows, seen by those upon the train, they must have seen it, and should have waited until it passed.

The collision was seen, or the boys and their wagon, just before it occurred, by Van Orden, the engineer, Paterson, the conductor, Mr. Westervelt, a passenger, and Dennis Connel and Cookson, brakemen, also by John Kunz, who lived near by, and says he saw the boys pass his house in the wagon just before the accident occurred, all witnesses for the defendant; and Jane Smith, a witness for the plaintiff, who saw the occurrence from her house, eight hundred or nine hundred feet from the crossing.

Van Orden says: I saw this wagon before the boys were struck; when I first saw them we were about half a mile from the station; that he saw the wagon coming down past the hotel—the train was then going sixteen or eighteen miles

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Telfer v. Northern Railroad Co.

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an hour; that he blew the whistle at the usual place; that about three hundred yards from the station he blew on the brakes to decrease the speed of the train, and immediately blew them off again; when he did so, the boys stood in the little hollow near the track—the horse was standing still; that one of the boys looked out; that the middle curtain of the wagon was up on the south side; that the boy was driving, and looked out toward the train; that he got a signal from the conductor that there were no passengers to land, and then let on steam—just then the wagon started ahead; that he blew the brakes on and reversed the engine, but the collision took place. He further said, that when the horse started, he made a move as if hit with a whip.

Paterson, the conductor, says: that on that day, when he came to the door of the baggage car, in which he was while the train was passing through a clump of trees, sixteen hundred and sixty-one feet from the crossing, the whistle was blowing; that he swung his body out towards the platform as usual—when he looked, he saw the wagon standing; that it attracted his attention; that the curtain was up, and the boy he saw looked out towards the train; that he had something in his hands; the horse was standing. He gave the engineer the signal, no passengers, and the brakes were let off; when the train got to the barrack the horse started, the boy who was driving reached forward over the dash-board, and raised the lines or a whip—the horse was galloping; that after the boys started, the signal to apply the brakes was given very loud and very quick in succession.

Westervelt, the passenger, says: going through the woods, he heard the whistle, an alarm whistle; stepped out on the platform of the first passenger car, and looked ahead; saw a horse and wagon standing from the track some distance on the right hand side of the track on the plank road; they were not moving at all when he saw them; he saw one person in the wagon who was looking out forward; he saw the wagon standing there, and he supposed everything was



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Telfer v. Northern Railroad Co.

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right; he then stepped in, and heard nothing more until he heard the boys were hurt.

Connel, the brakeman, says: he saw the wagon moving down towards the track, just coming to a stop—this was when he put the brakes on; coming through the clump of trees, he got a signal to let go, and as he did so he got a signal to put them on, and did so.

Cookson's testimony is substantially the same: he saw a wagon near the track coming to a stop; looked out after putting on the brakes; saw the horse approaching the track; the horse started, and was going across as if he had been whipped or got scared; one of the boys was leaning over the dash-board.

Paterson, the conductor, says: that one of the boys, after the accident, at McCollum's, where he was carried, was asked by him if he saw the train, and answered yes; that he asked him why he tried to get across, and the boy answered he thought he could get across. Cookson testifies to the same thing. Although this testimony was seriously controverted, I think it is not without the bounds of possibility, as well as probability; yet I have formed my opinion of the case, laying it out of view.

Jane Smith, called for the plaintiff, saw the accident from her house, seven or eight hundred feet distant; the wagon was going from her; she says she saw the boys pass the McCollum house, and that they did not stop before they were struck; she first saw them near the sign post—she then heard the train. It is not remarkable that at that distance she did not see the wagon, going from her, stop. We see, however, that even she heard the train coming while the boys were in a place of safety.

This is the substance of the evidence on this important point, and it demonstrates that the boys saw or heard the coming train in season to avoid the collision; that they stopped a short distance from the track; that, seeing them stop, the engineer went on, supposing they were going to stand

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Telfer v. Northern Railroad Co.

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still ; that, intending to cross in advance of the engine, they suddenly started, or the horse became unmanageable.

In either event the defendants are not liable, if it was impossible, at that time, to stop the train soon enough to avoid a collision ; they are not liable either for an accident in part produced by the wilfulness of the boys, or for an accident caused by the fright of the horse.

By this evidence, the case is brought within the rule laid down in the cases of *Moore v. The Central Railroad Company*, 4 Zab. 268, 853 ; *Runyon v. The Central Railroad Company*, 1 Dutcher 556, that where the party injured, either by his conduct or want of care, contributes to the production of the injury complained of he cannot recover.

The damages were excessive. The jury allowed for the loss of the services of the boys more than by any calculation they can be shown to have been worth to the father, considering the period of service which yet remained, and his duty as a parent towards them, and their liability to sickness and death. For David's services they gave \$936 ; he had about —— years to serve his father. For William's, they gave \$1056 ; he had about seven years yet to serve his father.

The common law gives no action to a father sustaining such an injury. The action is given by statute. *Nix. Dig.* 193. The language of the act upon the subject of the damages is, "the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting to the wife and next of kin of such deceased person."

It is manifest, from the structure of this section, that it was not designed to vest an arbitrary discretion in the jury, to give what damages they may think fair and just, without reference to any fixed standard by which to estimate them. The important qualifying words are added, referring to the pecuniary injury resulting to the widow or next of kin. The injury forming the basis of calculation must be pecuniary—nothing else can enter into the estimate. There can be no recovery for loss of society or wounded feelings, or anything

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Telfer v. Northern Railroad Co.

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else which cannot be measured by money and satisfied by a pecuniary recompense.

The third section of the act makes it the duty of the plaintiff, to give a bill of the particulars of the nature of the claim, in respect of which damages shall be sought to be recovered. This does not refer to the circumstances attending the death; that is not what is to be called for and given; the declaration gives that; but it is to be a statement of the particulars of the pecuniary loss sustained. The object of this provision is to enable the defendant to know in what way the damages are to be estimated, so that we may come prepared to meet that part of the case.

Some limitation was imperatively required, by obvious considerations, upon the amount to be recovered.

The legislature of New York, in 1847, passed an act of this character, and in 1849 limited the sum to be recovered under it to \$5000.

In *Quin v. Moore*, 15 *New York Rep.* 434, which was an action under the New York act containing the same provision as ours in respect to damages, the court say: "The theory of the statute is, that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict." Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into the account.

The English act, 9 and 10 *Vict.*, c. 93, contains a provision, that the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought.

In *Blake v. Midland Railway*, 18 *Q. B.* 93, in an action under this act it was held, that nothing could be recovered, except the pecuniary loss sustained by reason of the death, by the persons for whose benefit the action was brought, and that the measure of damages was not the loss or suffering of the deceased, but the injury resulting from the death to his

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Telfer v. Northern Railroad Co.

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family, and that nothing was recoverable as a *solatium*. Coleridge, J., makes this remark, that it must be recollected that the act applies not only to great railway companies, but to little tradesmen, who send out a cart and horse in the care of an apprentice.

It would seem that this would have been the proper rule of damages if it had not been prescribed by the act. *Ford v. Monroe*, 2 Wend. 210; *Park v. The Mayor of New York*, 3 Coms. 489.

The rule to show cause must be made absolute.

VAN DYKE, J. These two suits were tried together, and were brought by the father to recover compensation in money for the loss of his sons, who were killed by coming in collision with a locomotive and train of cars. It is difficult to look at these suits in the light of mere actions for damages, without being influenced, in some measure, by considerations, such as we labor, almost in vain, to turn aside from. The sad fate of the two lads, and the grievous affliction which so suddenly fell upon a parent's heart, are well calculated to awaken the kind sympathy of every human bosom. Sympathy and condolence we may indeed extend to the plaintiff, but unfortunately for him, we cannot permit these to influence us in the sterner duties which we have to perform in the cases. The only question which we can examine into is, whether he has shown himself entitled to sustain the verdicts which he has obtained. The jurors doubtless discharged their duty honestly and conscientiously in these cases; but it is none the less the duty of the courts to set these verdicts aside, if they be found contrary to the law and the testimony.

The charge is, that this occurrence took place through the carelessness, negligence, and improper conduct of the defendants. It seems to be very well settled, that if it did not take place in some such way there can be no recovery; but it is equally well settled, that although there may be carelessness and negligence on the part of the party doing the injury,



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Telfer v. Northern Railroad Co.

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yet if there was an equal amount of carelessness, negligence, and improper conduct on the side of the party injured, he cannot recover for such injuries. And this is the answer which the defendants make to the plaintiff's charge, that the carelessness and negligence was not on their side, but on the side of the parties injured: and that, for this reason, the verdicts are contrary to the law and the evidence.

It is not an easy matter to determine always what constitutes legal negligence and carelessness on the part of those who conduct railway trains, for we cannot very well compare them with any other mode of land conveyance. Railroads and railroad trains and railroad travel are specially authorized by law. The legislature are supposed to know that these trains move with immense weight and power and speed, and they authorize them to do so, neither limiting nor restraining them, to any extent, in these respects. It is also well known that at the rate of speed at which they go they are far less governable, so far as stopping is concerned, than in any other mode of land travel, and far more dangerous in cases of collision. This the legislature are supposed to know and understand, and yet they seem to authorize them so to move. They are required, it is true, to ring their bells, blow their whistles, and keep up sign-boards, but they are not required in any case to lessen their speed when crossing any other road, or to station signal men there, except when municipal corporations occasionally impose upon them these duties. Nor would the company be responsible for damages arising from collision when there was no whistle blown, or bell rung, or sign-board up, if the absence of these things in no way contributed to the accident. It is difficult, therefore, to determine that a company is guilty of negligence, or carelessness, or improper conduct, while it is only doing those things which the legislature has, by formal enactments or by necessary implication, expressly authorized; for instance, many of our railroads, which frequently cross our common highways at very acute angles, and after running parallel with them and close to them for long distances, thus frightening the

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Telfer v. Northern Railroad Co.

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horses and terrifying and endangering all persons traveling on such highways, would doubtless be considered public nuisances, and be indictable as such, if carried on by private individuals not authorized by law ; yet when the legislature, which is supposed to take all these things into consideration, expressly authorize them so to do, they cannot be considered as nuisances. This was so held in 4 *Barn. & Ald.* 30,\* *Roscoe's Crim. Evidence* 794.

It is very easy, however, to see how all other persons who attempt to go upon or across a railroad track are placed under the necessity of using much greater care and caution than when going on or across any ordinary road ; for all other persons and conveyances are usually under immediate control, and may be stopped instantly if any danger threatens ; but railroad trains are notoriously otherwise, and hence greater care and caution are necessary to avoid them. All other conveyances can turn to the right or to the left, or in any other direction, to avoid accidents ; but railroad trains can do neither. They have a single fixed track, in which they must move, and can go nowhere else. All persons and things are perfectly safe from collisions except on this narrow track, and cannot be harmed unless they go upon that track ; consequently every person is under the strongest possible obligation not to venture upon that track when the cars are about to pass. If he do so, and get hurt, it can scarcely be otherwise than that the risk and the fault are his own. Nor does it make any difference how strongly the party may believe or suppose that he can cross with safety. If he get hurt, the miscalculation was his own, and the consequences must rest upon him. Nor does it at all change the case that the party did not think of the cars. He was bound to think of them if he knew the road was there. Nor is it any excuse that he was in a covered wagon, and did not see, or did not see fit to look ; for a person cannot close his eyes or cover himself up in the midst of danger, and then plead that he could not see. Neither can it be successfully urged that the persons injured were too young to exercise the prudence and

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\**The King v. Pease.*

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Telier v. Northern Railroad Co.

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discretion of an adult ; for this is the very reason, if so, why they should not have been exposed to such a peril. It was carelessness or recklessness to do so.

It is not a trifling matter to stop a train of cars where it would not otherwise stop when it is running on time, and is required to pass another train at a given point, and when the failure to do so might produce serious consequences. I do not think a conductor is bound to stop his train because he sees an individual standing on the track a quarter of a mile ahead of him ; because he has every reason to suppose that he will leave the track before the cars reach him. Nor do I think he is bound to stop his train because he sees a vehicle slowly approaching the road, or quietly standing a few yards from it, with the horse's head towards it ; for he has every reason to suppose that they will not attempt to cross until the train be passed ; and if they suddenly attempt to do so when too late to stop the train, and get injured in the effort, the fault is not that of the company nor its agents, unless their conduct be so grossly negligent, as that the exercise of proper and reasonable caution and prudence on the part of the party injured could not have protected him from the injury.

It is true, then, that these verdicts are contrary to the law and the evidence, or either of them ? If they are, they should be set aside. The law on the subject seems to be so well settled by numerous decisions, to be found scattered through the law books, and is so unmistakable that I shall not occupy time in referring to it. It may be fairly and safely assumed that, where the negligence, or carelessness, or improper conduct of the company or its agents is clear, or where the exercise of a reasonable amount of care and prudence on their part would have prevented the collision, and they did not exercise it, they will be liable, provided the party injured was not himself guilty of the same want of reasonable care and prudence ; for if he too, by the exercise of a reasonable amount of care and prudence, might have avoided the accident, and did not exercise it, he cannot

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Telfer v. Northern Railroad Co.

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recover, even though the company were culpably negligent. He cannot visit the consequences of his own indiscretion, folly, or want of judgment upon the adverse party. He must bear them himself.

I cannot say that the plaintiff did not offer evidence enough to warrant the cases in going to the jury, yet I am forced to say I think it was very slender; unless, indeed, the mere fact that the boys were killed by the collision is of itself sufficient to make out the case in the first instance; a proposition which I think we cannot properly admit. Of the seventeen witnesses which he offered, but one only seems to have seen the occurrence at all, and she saw it through the window of her dwelling-house, at a distance of some eight hundred feet, and when looking directly on the rear of the wagon, which was closed behind. She did not hear either bell or whistle before the collision; she first saw the boys by the sign-post, some ninety feet from the track; she did not then see the cars, but heard them. Several of the witnesses were in the public house near by, with closed doors and windows, who did not see the occurrence until it was past, and most of whom say they did not hear the whistle till after the collision; a fact which they could not very well know, as they did not see precisely when it did take place. Another of the plaintiff's witnesses says he stood in the shed and saw the cars for a considerable distance, till within thirty or forty feet of the crossing, but the blowing of the whistle and the noise of the cars frightened his horses, and he did not see the accident. A number of witnesses were also examined to show that the crossing was a dangerous one. It certainly was somewhat dangerous, and so is every other crossing, unless some care and caution are used by persons attempting to pass over; but, according to the map or diagram produced by the plaintiff, the crossing was not remarkably dangerous. But no witness on the part of the plaintiff says anything which goes to show, whether the boys acted prudently or imprudently, whether the fault was wholly their own, or whether it was not.

The testimony on the part of the defence is much more



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Telfer v. Northern Railroad Co.

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definite and positive. Six witnesses say they saw the occurrence; five of them were on the train, though not all in the defendants' employ. They all concur in saying that the whistle was blown some half mile from the station; the brakes were put on to check the speed until it could be ascertained whether there were any passengers to get on or get off at the station. When the signal was given that there were no passengers, the whistle was again blown to take off the brakes. In an instant it was again blown, violently, to put them on again, indicating danger, and continued to blow violently until after the accident. The brakemen say that the brakes were instantly applied. The engineer says the engine was instantly reversed, and that the bell was rung for a considerable distance.

These five witnesses concur in saying that when the brakes were last blown off, and the cars some two hundred and fifty or three hundred yards from the crossing, the horse, wagon, and boys were quietly standing back from the track, a distance which measures thirty-two feet; that one of the boys was then looking out of the front of the wagon at the train, but at the moment of blowing off the brakes, the horse, by a stroke from the lines or a whip, or something else, was started across the track, and at such speed that he was on a gallop when the wagon was struck. A sixth witness, who was not on the train, but was close by, confirms the testimony of the other five, so far as the conduct of the boys is concerned. He says that he saw the cars, and told the boys that they were coming; that the older boy answered that he did not care. He says that they stopped, however, a short distance from the track; he saw the boy strike the horse with the lines, and he scared and started north, and the cars caught him.

All this evidence touching the conduct of the defendants, as well as that of the boys, is wholly uncontradicted, except by the witness who saw the occurrence from her window, at a distance of eight hundred feet. She says the wagon did not stop at all; but as she was some distance off, and was looking directly at the rear of the wagon, and through the glass of

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Telfer v. Northern Railroad Co.

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her window, she could not very well tell with certainty, and may be mistaken as to that fact; but the others all saw the occurrence from points which did not admit of mistakes in that particular.

Three of the witnesses also say that they heard one of the boys say, after he was hurt, that he saw the cars coming, but thought he could get across. The speed of the cars is estimated by some at from eighteen to twenty miles per hour, and by others at from thirteen to fifteen.

Does this evidence, then, taken altogether, show any negligence or improper conduct on the part of the defendants or their agents? If it does, I am wholly unable to perceive it. I do not see what they could have done that would have prevented the accident that they did not do. If it be true, and it is abundantly proved, that the boys had stopped their wagon, and were looking at the cars as they approached, the conductor was not bound to stop the train to see what they intended to do next; for he had every reason to suppose that, having once stopped, they would remain in that condition until the train should be passed. The evidence of persons that they did not hear the bell or the whistle, when they were not in a good condition to hear them, or if they heard the whistle at all, that it was not blown until after the collision, when they did not see the collision at all, cannot have very great weight against the evidence of those who did see and hear, and say it was positively and directly otherwise.

Does the evidence, on the other hand, show that the conduct of the boys was cautious and prudent, such as the occasion called for? On the contrary, it seems difficult to imagine a case, where the exercise of those duties could have been more deplorably absent. Their action was rash and indiscreet in the extreme. The locomotive must have been within but a few yards of them when they attempted to cross; they had but thirty-two feet to go, and with their horse on a gallop, they had not yet got over when they were

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Telfer v. Northern Railroad Co.

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struck, showing that the train was very close to them when they started.

Unpleasant as the idea is, there seems no way of resisting the conclusion that the fault, as well as the misfortune, was wholly and entirely their own. It appears, too, by the evidence of their sister, that these boys had been in the habit, one or the other of them, of going this way every day for the last two or three years, and returning about the same time; that the horse was the one they usually drove, and that he was gentle, and so said others; so that nothing can be urged in their favor on the score of their being ignorant of the peril into which they went.

These verdicts, therefore, are contrary to the law of the land which governs such cases, and that law should be fully and strongly declared and maintained; for the public are as much concerned in the caution and prudence of those who cross railways, as they are in the caution and prudence of those who conduct the trains. If this occurrence, happening just as it did, had left the boys unharmed, but had thrown the train from the track, killing half a dozen passengers, and maiming four times that number, we should have seen more clearly the force of this remark. The necessity for caution, therefore, is tenfold greater when crossing a railroad track than in crossing any other road, and the culpability of their neglecting to exercise that caution is ten times as great as in ordinary cases. In crossing ordinary roads, caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads, it is exacted to avoid being run over yourself. In the former case the blame attaches *prima facie* to the party doing the injury; in the latter, it attaches, in the first instance, to the party obstructing the track. Common prudence and common caution require every person approaching a railroad crossing, if he knows of it, to pause, and see if he can cross with safety; and if there be any danger at all, he is bound to wait until it is past; and although there may be much practice to the contrary, still if he do not do this, he does not exercise either common prudence or common caution.

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Telfer v. Northern Railroad Co.

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The evidence in these cases affirmatively and clearly proves the most culpable rashness and improper conduct on the part of the boys, and therefore the verdicts are contrary to the law which we are bound to apply to them, and for this reason they should be set aside.

The verdicts, too, are clearly against the evidence in the cases; not merely against the weight of evidence, but contrary to the whole evidence; and they should be set aside for this reason also; and to this conclusion I should have been brought, as a matter of necessity, even if the defendants had offered no evidence at all, for the reason that, with their evidence, or without their evidence, there is nothing in the whole of it which shows affirmatively that the boys exercised any care, prudence, or caution whatever to avoid the occurrence, or that the fault was not clearly and positively their own. These things, or some of them, the plaintiff was bound to show before he could be entitled to the verdicts.

It is insisted, also, that the damages in these cases are excessive. In the case of David they are assessed at \$936, and in the case of William at \$1056. In the view which I have taken of the cases, it is not necessary to examine this part of them, but the question presented is one of importance, and deserves the consideration of the court, either now or at some other time. The jury seem to have been left pretty much to their own conclusions in the matter, as there was but little, if any evidence to throw light on the subject beyond the fact of the relationship between the father and his children; and it may be doubted if they could have reached the conclusions which they did, if they had been governed by correct legal principles.

The action is the creation of the statute, and it is needless to say that it must conform strictly to it. It is liable to great abuse, and the court should see that every verdict which is rendered contrary to it should be set aside. It is simply an action to recover in dollars and cents, a compensation for the loss and damages which have actually been sustained. As the father of his children, the plaintiff was entitled to their services until they should arrive at the age



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Telfer v. Northern Railroad Co.

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of twenty-one years; and what those services might reasonably have been expected to be worth he was entitled to recover, and nothing more, unless it be expenses growing out of the injuries, subject to the burthens and encumbrances which that relationship imposed upon him. Nothing can be allowed for the mental anguish which, as a parent, he is supposed to have suffered. Nothing for the satisfaction and comfort of having his sons—nothing for the loss of their society and associations.

The damages in the case of William are fixed at \$1056. He was over thirteen years of age, and had something over seven years to serve his father. There is an allowance, then, of about \$150 per year on an average. This is about what the services of a full grown man would be worth in the business in which the plaintiff was engaged, when boarded, provided he should work faithfully the whole of that time.

If this is the principle upon which the jury proceeded, they were unquestionably wrong; for as the plaintiff was bound not only to feed but to properly clothe and educate his son, and to take care of him if sick, pay his physician's bills, &c., it may well be doubted whether his services would have been worth any more than his board, clothing, education, and other incidentals, previous to his arriving at the age of eighteen years. At all events, these things should have been taken into consideration by the jury, and proper deductions made on account of them, as well as for the days of idleness, of absence and of pleasure, incident to such relationship, and likely to intervene. The jury seem, too, to have gone on the supposition that William would remain in sound health, and serve faithfully during every day of the time; whereas they were bound to consider the probability that, through accidents, sickness, and the like, he might be unable, possibly for a considerable portion of the time, to perform service at all, when he would be an expense, rather than an advantage. Then, too, they seem to have taken it for granted that he was certainly going to live through the whole period, and his life, during the whole of that time, the defendants are made to insure; whereas it was possible he

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Telfer v. Northern Railroad Co.

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might die the next day, when his services, of course, would have ceased. We may be quite willing to bind ourselves to pay a man \$1050 for seven years' service, if we can certainly have that service secured to us, when we would not be willing to pay half that sum if we are to take all the risk of his sickness, accidents, and death in the meantime. These things, too, should have been taken into consideration and allowed for; and if they had been, all of them, it seems difficult to see how the jury could properly have *calculated* the damages at \$1056. The same principles and rules apply of course to the case of David; and if this were the only reason on which we are asked to set the verdicts aside, I should feel constrained to yield to it, believing, as I do, that the jury *must* have proceeded upon erroneous principles, in this respect, in reaching their conclusions.

ELMER, J. The weight of evidence in this case so clearly indicates, that the culpable negligence of the plaintiff's sons contributed to produce the collision which caused their death, that I think we are bound to make the rule for a new trial absolute.

I am also of opinion that the damages were excessive. The jury had no legal right to give more than the actual pecuniary injury to the plaintiff, the father and next of kin of the persons killed, resulting from their death. In this case there was little or no difficulty in arriving at a correct result. The boys were of the ages of thirteen and fifteen years, so that the father was entitled to fourteen years' service from them before they became of full age. The true rule for measuring his injury was the cost of procuring equivalent help from others, whose clothing and other necessities should be furnished by him; to which might, perhaps, be added reasonable funeral charges, beyond what was expressly contributed for that purpose. Upon the most liberal computation, these expenses could not have amounted to anything like the sum awarded by the jury.

Verdict set aside.

CITED in *Bonnell v. D., L. & W. R. R. Co.*, 10 *Vroom* 192; *Morris and Essex R. R. Co. ads. Haslan et al.*, 4 *Vroom* 151; *Blaker's Executrix v. Receivers of N. J. Midland Co.*, 3 *Stew.* 244. •

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Wrege v. Westcott.

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## FREDERICK WREGE v. HENRY WESTCOTT.

1. In an action of trespass for assault and battery, evidence directly tending to show that the plaintiff had got up a false case, to impose upon the jury, is competent in mitigation of damages.
2. A letter from the plaintiff to the father of the defendant, not containing a statement of any facts material to the controversy, and relating only to an offer of compromise, is not competent evidence.

On rule to show cause, &c.

This was an action of trespass for an assault and battery. The issue was tried at the Hudson Circuit, and a verdict rendered for the plaintiff for six cents damages.

A rule on the defendant to show cause why the verdict should not be set aside was granted by the court.

The reasons assigned for setting aside the verdict are stated in the opinions delivered.

For the rule, *S. B. Ransom*.

Contra, *C. H. Winfield*.

The opinion of the court was delivered by the

CHIEF JUSTICE. There was a verdict in this case for the plaintiff for six cents damages. The action was for assault and battery. The plaintiff seeks to set aside the verdict because the damages are insufficient to compensate for the injury, and should have been more than nominal under the evidence in the cause; and also upon the further ground of the admission of illegal evidence on the part of the defendant, and the rejection of legal evidence offered by the plaintiff.

The plaintiff was a hired man, working on the farm of the father of defendant, some distance from Jersey City. The defendant lived with his father in Jersey City. The plaintiff alleged, on the trial, and attempted to prove that, in March, 1860, while near the stable of the defendant's father attending to his lawful business, he was set upon and cruelly beaten with a stone by the defendant; that during the conflict, he

## Wrege v. Westcott.

received a blow, which produced a rupture of the walls of the abdomen, so that his bowels came out.

On the other hand, the allegation of the defendant was, that the *plaintiff* sought a quarrel and conflict for the purpose of feigning injury and sickness on account of the beating he might receive, in order to get damages from the defendant; that this was a preconcerted plan, and avowed by him in advance of the quarrel; that the plaintiff received no substantial injury, and that the rupture with which he was afflicted was the result of a previous injury, and had been of long standing.

Both parties directed their evidence to sustain these points, and to rebut the proof made against them. Michael Keefe, who was present at the affray, and was a principal witness for the defence, testified that he had a conversation with the plaintiff about a difficulty he had with the defendant; that he and Henry had had such a difficulty some time before, in which plaintiff said he was a damn fool, that he did not get around him, so that he would strike him, then go home and go to bed, and say he was sick, and send for a doctor, and then he could knock a little \$300 or \$400 out of him; that he told him it was not worth while—he could earn enough to support himself.

This evidence the plaintiff objected to as irrelevant.

There was considerable medical evidence in the cause to show that the rupture could not have been the result of injury received by plaintiff at the quarrel, and that it was pretended to have been caused by the defendant to extort money, by untruly aggravating the damages.

The evidence was competent for the purpose of showing that the plaintiff had got up a false case to impose upon the jury. It directly tended to prove that, and was therefore calculated to diminish the plaintiff's damages.

On his cross-examination, this witness said that defendant did not strike or hurt him at all; that he did not have his head tied up, or show Frederick Wrege, plaintiff's son, any marks on his head or face, and tell him that it was where



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Wrege v. Westcott.

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Harry Westcott had beat or struck him, for he did not strike or hurt him.

The plaintiff, on his rebutting case, offered to show, by plaintiff's son, that he did see Keefe have his head tied up after his trouble with Henry, and did see the marks on it which he said were made by Henry Westcott. The court overruled this evidence.

The evidence was competent to contradict Keefe. His testimony was material, as I have already stated, to show the existence of a quarrel between him and Henry, in which he was not injured, and the advice of the plaintiff to feign an injury, which he had not received, to extort money from Westcott.

If that was competent, I think this is so also, as it directly tends to weaken the force of the evidence of Keefe as to plaintiff's advice to feign an injury which he had never received.

Plaintiff's counsel also objected to a letter of the plaintiff, written to the defendant's father, in June, 1861, in regard to the then pending suit. It all relates to an alleged offer of compromise, made by Mr. Winfield on behalf of defendant's father, and to conversations between him and Mr. Winfield and his own counsel, about the inability of plaintiff, a poor man, to cope in litigation with a rich legislator like Mr. Westcott. At the close of the letter, the plaintiff says, I give you now three days' time, from the date above said, to let me know whether I receive \$600 out of your hand or not; otherwise I will take a step you should not like very much.

This letter was written for the plaintiff, he not speaking or writing English, and sent to Mr. Westcott, the father.

The \$600 referred to in it was the amount which the plaintiff alleged Westcott's attorney had agreed to pay him, by way of compromise. The letter does not contain any statement of any fact material to the controversy; it relates entirely to an offer of compromise, and should not have been received.

These decisions of the court necessarily prejudiced the

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Wrege v. Westcott.

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plaintiff, and reduced, it is probable, the amount of damages recovered by the verdict to the unusual sum found, at least we cannot say they did not produce that result.

The verdict should be set aside, and a new trial granted.

VREDENBURGH, J. This was an action brought by the plaintiff against the defendant for an assault and battery. The defendant pleaded not guilty. A verdict for the plaintiff for six cents.

The plaintiff now moves for a new trial—1st, upon the ground that the verdict was against the weight of the evidence; 2d, upon the ground of illegal evidence admitted; 3d, that legal evidence was overruled.

Without going into the question of the weight of the evidence, or expressing any opinion thereon, I think that illegal evidence was admitted in the case. One Michael Keefe, a witness for the defendant, testified, among other things, that some time before the assault complained of, he, Keefe, had a difficulty with the defendant, and that, in a conversation he, Keefe, had with the plaintiff about this difficulty between Keefe and the defendant, the plaintiff said to Keefe, that he, Keefe, was a fool that he did not get around the defendant so that he would strike him, then go home and go to bed, and say he was sick, and send for a doctor, and then he could knock a nice little \$300 or \$400 out of him. Keefe answered the plaintiff, that was not worth while; he could earn enough to support himself. Now the facts proved here were not relative to the controversy before the court; they related to an assault and battery at another time, and upon another person, and whether the defendant had or had not committed an assault and battery upon Keefe was a matter of indifference to the cause on trial. The evidence could only have been produced to prove the bad character of the plaintiff, to prove that he could advise another man to sue the plaintiff on an unjust claim. Such evidence for such a purpose was incompetent. In the first place, it is proving a bad character by a specific act, which the plaintiff could not be deemed to

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Beale v. Berryman.

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have come prepared to meet. In the next place, whether the advice the plaintiff gave Keefe on that occasion involved any moral turpitude, depended altogether upon the question whether Keefe had a just claim upon the defendant for damages. So that if it was competent for the defendant to prove that the plaintiff gave such advice to Keefe, it was clearly competent for the plaintiff to prove, if he happened to be prepared to meet such an issue, that Keefe was in reality hurt, and had a just and good cause of action. This the plaintiff did actually afterwards offer to prove. This offer by the plaintiff the court overruled. So that the case went to the jury under proof that the plaintiff was base enough to advise Keefe to bring an unjust suit against the defendant, while the evidence offered by the plaintiff to prove that Keefe had a just cause for a suit against the defendant, and that his advice was honest, was overruled.

The original offer of the evidence of Keefe, in this regard, was illegal, and calculated to create prejudice, and probably did create prejudice in the minds of the jury against the plaintiff, or at least, if it was competent for the defendant to prove it, it could not be illegal for the plaintiff to disprove it.

Let the verdict be set aside.

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HORACE A. BEALE v. WILLIAM H. BERRYMAN.

1. To a suit on a judgment in New York, the plea of *nil debet* is the general issue.
2. Under our statutes of 1799, *Nix. Dig.* 681, § 3, and of March 6th, 1852, *Nix. Dig.* 681, it is regular in such suit to plead *nil debet*, and give notice that no summons had been served in New York; and judgment signed, as for want of a plea, will be set aside with costs.

In debt. On motion to set aside judgment.

For the motion, *A. O. Zabriskie*.

Contra, *J. W. Scudder*.

## Beale v. Berryman.

The opinion of the court was delivered by

VREDENBURGH, J. This was an action of debt, brought on a judgment against the defendant in the State of New York.

The defendant here pleaded *nil debet*, and gave notice that he should insist, at the trial, that no summons had been served on him in New York.

The plaintiff thereupon signed judgment as for want of a plea. Motion is now made to set aside this judgment upon two grounds.

1st. That the plea and notice were a good defence.

2d. That if they were not, there should have been a demurrer and motion to strike out the notice.

1st. Were the plea and notice a good form of pleading?

By the act of 1799, *Nix. Dig.* 681, § 227,\* it is provided, that it shall be lawful for any defendant in any action, except in cases of mutual dealing, to plead the general issue, and to give any special matter of defence in evidence, giving notice with the plea of such special matter. By the act of March 6th, 1852, *Nix. Dig.* 681,† it is provided, that in any suit brought on a foreign judgment, or judgment of any court out of this state, it shall be lawful for the defendant to show that he was not summoned, notwithstanding it may be so recited in the foreign record of judgment.

I do not understand the objection of the plaintiff to be, that the matter set up in the notice is not a good defence. That question is too well settled to be seriously raised. *Aldrich v. Kenney*, 4 Con. 380, and cases there cited. But the objection is to the form of the pleading. It is said that the statute, *Nix. Dig.* 681, § 227, only allows a notice of the matter of defence upon a plea of the general issue, and that *nil debet* is not a plea of the general issue, and therefore the notice is irregular.

A judgment of another state, when brought to be enforced here, is undoubtedly a foreign judgment. Execution cannot issue on it here nor can it be enforced *proprio vigore*. The constitution of the United States, indeed says, that full faith

\*Rev., p. 866, § 117. †Rev., p. 380, § 15.



Beale v. Berryman.

and credit shall be given, in each state, to the records and judicial proceedings of any other state. But that does not make them judgments of this state. A properly certified record of a judgment in another state is a good foundation for a judgment here, but is not itself a judgment. It is, notwithstanding the United States constitution, a foreign judgment, but entitled to peculiar credit by virtue of the constitution.

It is also well settled that *nil debet* is the general issue in debt on a foreign judgment. 1 *Ch. Pl.* 485; *Bissell v. Briggs*, 9 *Mass.* 462. This is not a question whether the plea of *nil debet*, standing alone, is a good plea on a judgment from a sister state, for it has often been held that it was not; but the question merely is as to the form of pleading, whether *nil debet* is the general issue in debt on a foreign judgment.

If it is, then the notice is proper and regular under our statute.

The judgment must be set aside with costs.

BROWN, J., (dissenting.) This action was brought upon a judgment rendered for the plaintiff against the defendant in the State of New York. The defendant pleaded *nil debet*, and gave notice with the plea that he would prove on the trial that the court which rendered the judgment had no jurisdiction of the person of the defendant. The plaintiff disregarded the plea, and took judgment as by default.

The questions are, whether the plea of *nil debet* is good for any purpose, when pleaded in an action upon a judgment of another state, and if not, whether the defendant had the right to treat the plea as a nullity, and take judgment.

There is no doubt that this plea is good when pleaded to a foreign judgment, and bad when pleaded to a domestic judgment. To the first it is a sufficient answer, for the judgment may be inquired into, and is only *prima facie* a good cause of action. To the other it is no answer, for the judgment is conclusive evidence of the debt. The action is in debt and for the recovery of a debt, but it is a debt adjudi-

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Beale v. Berryman.

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ated. For the defendant to say I do not owe it is nothing. The record says he does owe, and the plea, if good for any purpose, admits the record. It is now well settled that judgments of other states have equal validity with domestic judgments. If contested, it must be upon the plea of *nul tiel record*, or by special plea setting up a want of jurisdiction of the court, or of the state in which judgment was rendered over the person or property to be affected by the judgment. The merits of them cannot be inquired into upon plea of *nil debet*. That plea is therefore bad to the same extent as when pleaded to any other record or specialty. *Moulin v. Insurance Co.*, 4 Zab. 223; *Gilmore v. Lewis*, *Ib.* 246. But is the plea a nullity, so that judgment may be entered as for want of a plea? The plaintiff cannot take issue upon the plea without opening to inquiry the merits of his judgment. He must either demur, move to strike out, or sign judgment.

In note 3 to the case of *Jones v. Pope*, 1 *Saund. R.* 38, it is said, that when the action is founded upon a record, *nil debet* is no plea.

There are some authorities to the effect, that though a bad plea, it is not a nullity. *Tidd's Pr.* 586; 2 *Chitty's Rep.* 239.\* I find no American authorities. The question must therefore be settled upon principles adapted to the present rules of pleading and practice in New Jersey, and the policy out of which they grow.

The legislation of the last twenty years shows that two objects have been in view; one to relieve debtors from execution against the person, and the other to give creditors a prompt remedy against property. In adapting the practice to this policy, the plaintiff, especially in actions *ex contractu*, should not be delayed by requiring demurrer or motion to get rid of a plea, which is no answer to the declaration, and which has been held bad in substance so often that on demurrer an argument would not be allowed.

It was insisted, upon the argument, that the plea and notice made a good answer to the declaration, and that the plea for the purpose of admitting the notice should be considered the

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\**Paterson v. Everard*.

## Randall v. Roche.

general issue, seeing that *nil tid record* would not serve for that use, as it tendered an issue to be tried only by the court. This question was considered by the Supreme Court of New York, in the case of *Bullis v. Giddens*, 8 *Johns. Rep.* 82. The action was on recognizance of bail; the plea *nil debet*, to which there was a demurrer and joinder. The court, after sanctioning the above rule, that "when the action is grounded upon a record or specialty" *nil debet* is no plea, proceed to say, "that although this rule may deprive defendants in such cases of pleading the general issue with notice of special matter, it does not preclude them from pleading specially any matter which they may have to set up in their defence; and this inconvenience had better be submitted to than to innovate upon the established rules of pleading." Subsequently, by statute of New York, such pleading with notice was made legal. As the law now stands in New Jersey, I am of opinion that the plaintiff had the right to disregard the plea and enter judgment. The rule should be discharged; but as the question is new, if the defendant has merits, the judgment will on application be opened, and leave given to plead anew on payment of costs.

Judgment set aside with costs.

## RANDALL AND MORELL v. ROCHE AND CREEDE.

1. The vessel lien law of this state applies as well to foreign as to domestic vessels.
2. A lien for supplies furnished to a foreign vessel, on the credit of one of the owners or the master, does not create a maritime lien on the vessel within the jurisdiction of the United States courts of admiralty, and may be enforced in the courts of this state.

This was a demurrer to certain pleas, the particulars of which sufficiently appear in the opinion delivered.

Argued at February term, 1862, before the CHIEF JUSTICE and Justices ELMER and VANDYKE.

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 Randall v. Roche.
 

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For the plaintiff, *I. W. Scudder.*

For the defendant, *R. Gilchrist.*

The opinion of the court was delivered by

ELMER, J. The action in this case is upon a bond given under the twelfth section of the act entitled, "an act for the collection of demands against ships, steamboats, and other vessels." 3 *Nix. Dig.* 529.\* The pleas demurred to aver, in substance, that the vessel in question, called the Pope Catlin, was a foreign vessel, enrolled in the state of New York, and owned by Roche, one of the defendants, the master of said vessel, and another person, both of whom resided in New York, and not in New Jersey. It was insisted by the counsel for the defendants, that the act above referred to does not apply to such vessels; and if it does, that, so far as it purports to give a lien for supplies furnished to a vessel engaged in commerce and navigation between different states, it is in conflict with the constitution and laws of the United States, which give exclusive jurisdiction of admiralty and maritime causes to the courts of the United States.

The terms of the act certainly include all descriptions of vessels, and however impolitic such lien laws may be justly regarded, they are, at present, evidently much in favor with those who control our state legislation, and whether wise or unwise, must be enforced according to their true intention by our courts. The act is copied from the New York law, where it has always been regarded as applying to foreign vessels; indeed, for many years, only such vessels were affected by it. 17 *Johns. R.* 54;† 1 *Wend.* 557;‡ 5 *Hill* 34;§ 3 *Selden* 508.|| Similar laws exist in many of the eastern and western states.

In regard to the conflict of jurisdiction, none of the pleas show that the lien sought to be enforced was within the ju-

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\**Rev.*, p. 586. †*Birbeck v. Ferry Boats.* ‡*Walker v. Blackwell.* §*Many v. Noyes.* ||*Pendleton v. Franklyn.*



## Randall v. Roche.

jurisdiction of the admiralty. The debt was contracted by Roche, the master of the vessel, and the pleas show that he was also one of the owners. By the maritime law of this country, where a master obtains supplies in a foreign port, (and a port in a different state from that in which the vessel is owned, is for this purpose held to be a foreign port,) which are necessary to enable the vessel to proceed, it is presumed that he makes the contract on the credit of the vessel, and there is a lien which will be enforced by the admiralty courts; but if the supplies were obtained by an owner or part owner, or if the master obtains them on his own credit, they are not liens. *The Virgin*, 8 *Peters* 538; *Thomas v. Osborn*, 19 *How.* 22.

It will not be necessary in this case to decide whether a proper maritime lien can be enforced in any other mode than by a proceeding in admiralty; and in view of the difficulties which beset the whole subject, and the diversity of opinion which has hitherto prevailed among the judges of the Supreme Court of the United States, it is best to express no opinion. See *Jackson v. Steamboat Magnolia*, 20 *How.* 393, and *Taylor v. Caryl*, 20 *How.* 583. But if it be admitted that the state courts have no jurisdiction in such a case, to divest the state courts it must be clearly shown that the lien in question was of that description. The facts stated raise no such presumption, nor is it averred in terms that the lien was one that came within the jurisdiction of the admiralty.

Judge Story, in the case of the *Bark Chusan*, 2 *Story's Rep.* 461, has made some observations which would seem to imply that he considered the New York statute would be unconstitutional if applied to a foreign vessel. Judge Nelson, however, in the case of *The Globe*, 2 *Blatch. C. R.* 430, takes a different view of it, and treats it as creating a good lien. He notices Story's remark, and says: "but this remark was made in answer to the argument that the statute controlled the jurisdiction of the admiralty, and in that view the statute would have been unconstitutional."

Chief Justice Watkins, in the case of *Merrick v. Avery*, 14

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Randall v. Roche.

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*Ark.* 378, gives an able opinion on the lien law of Arkansas, and remarks, correctly I think, that the beneficial operation of that law was to extend the privilege of the maritime lien upon seagoing vessels, for their building or equipment in domestic ports, just as that lien existed in Europe, and would have prevailed in England, and so descended to this country, but for the jealousy of the common law.

It was urged, by counsel, that the provision in the constitution of the United States, giving to congress the power to regulate commerce with foreign nations and among the several states, would exclude this lien from state cognizance. Much of the difficulty on the subject probably has arisen from confounding this clause with that giving jurisdiction to the federal courts in admiralty. If the legislative power given to congress to regulate commerce had been held to be exclusive, as is perhaps the better opinion, it would have covered the whole case, and no state legislature could create a new maritime lien, or in any way interfere with foreign commerce or commerce between the states. Such, however, is not the doctrine of the Supreme Court. That court holds the power over commerce to be, so far as it is exercised, paramount to state legislation; but the power of the state remains in other cases untouched, so that what congress has not regulated each state may regulate for itself within its own territory. As the constitution is now construed, congress may declare what debts shall be liens on foreign vessels, and that no others shall be, and thus render maritime liens uniform throughout the Union; and it will probably not be long before it will be found indispensable to do this. Large foreign ships are now liable to be seized by attachments and other state process, in such manner as may seriously embarrass commerce. But until this is done, the states may create new liens on vessels and enforce them.

What are properly admiralty and maritime causes, it has been found very difficult to define, and cannot be said yet to be definitely settled. In its nature, however, the admiralty jurisdiction is exclusive. But it is jurisdiction over admi-

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Randall v. Roche.

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ralty causes, and not jurisdiction over all causes affecting foreign vessels, or over all liens on such. At one time the admiralty courts enforced liens exclusively of state creation, a practice now abandoned as untenable. *Allen v. Newberry*, 21 How. 245; *Ib.* 249, *Maguire v. Card*. If a cause does not belong to the admiralty courts, they cannot interfere. When it does, the states cannot abridge or in any way control it. In all cases the common law remedies remain, and may be resorted to in the state courts. What is a common law remedy, and how far the state laws may change the course of proceeding, are difficult questions I shall not now examine. A debt constituting a maritime lien may be collected by a common law remedy, but admiralty proceedings cannot be instituted in state courts. Any cause of action which does not constitute an admiralty cause within the decisions of the Supreme Court of the United States, is not affected by the constitution of the United States. The state legislation may provide new liens and new remedies for such causes in all cases of vessels or parties coming within its territory, and thereby becoming subject to its laws. It is simply a contradiction in terms to say that a cause which is not an admiralty or maritime cause belongs exclusively to a jurisdiction which is confined to such causes, and can embrace no others.

I am of opinion that the demurrers are well taken, and that the pleas are bad.

The CHIEF JUSTICE, and HAINES and VAN DYKE, Justices, concurred.

CITED in *Edwards et al. v. Elliott*, 7 Vroom 454.

CASES DETERMINED  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF NEW JERSEY,  
AT FEBRUARY TERM, 1863.

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THE STATE, THE HOBOKEN AND WEEHAWKEN HORSE  
RAILROAD COMPANY, PROSECUTORS, v. THE MAYOR  
AND COMMON COUNCIL OF THE CITY OF HOBOKEN.

1. Ordinances of the mayor and common council of the city of Hoboken, prescribing the mode and times of running horse cars through the streets of said city by any corporation which has laid rails for the purpose of running horse cars thereon, and also that a license shall be first taken out under certain penalties therein mentioned, *held* invalid against the prosecutors, holding under their charter and also under anterior rights derived from the Bergen Turnpike Company, such company having the right to lay rails through the city without the consent of the city council.
2. The supplement to the charter of the city of Hudson, of the 15th March, 1861, authorizing the common council to grant permission to any persons or corporations to lay railroad tracks through the streets, and run cars on them, under such licenses and conditions as the said council should think proper, and subject to be revoked at pleasure, *held* to be prospective, and not to affect existing rights.

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On *certiorari* to remove certain ordinances, passed by the mayor and common council of the city of Hoboken, providing for the laying of railroad tracks, and running of railroad cars thereon, in the city of Hoboken.



## State v. Council of Hoboken.

The case was argued by *A. O. Zabriskie*, for the prosecutors, and by *F. B. Ogden* and *J. H. Lyon*, for the defendants.

The opinion of the court was delivered by

BROWN, J. The *certiorari* in this case brings up for review an ordinance passed by the council of the city of Hoboken, on the 26th of June, 1861, and two supplements to the same. The prosecutors, who have laid rails in the city for the purpose of running horse cars, complain that the third, fourth, and seventh sections of the ordinance and the supplements injuriously affect their interests, and that they are illegal.

The third section enacts, that any corporation which has laid rails for such purpose shall run a car each way every day, every half hour, between the hours of six in the morning and ten at night; the fourth, that such corporation shall pay fees for license to run cars; and the seventh, that such corporation shall always keep an office in the city, for the purpose of transacting their business. The first supplement, approved December 5th, 1861, provides, that if any horse car shall be run upon any track within the city without license, the owner shall be liable to a penalty of fifty dollars. The second, approved January 29th, 1862, provides a penalty for neglecting to comply with the directions of the third and seventh sections.

If the mayor and council of the city had such power of legislation over the railroad company, it must be found either as a condition annexed to the grant of the franchise to the latter company, or in the grant of legislative power to the city by the legislature of the state.

And first, are the ordinance and supplements legal by reason of conditions annexed to the grant to the railroad company of the right to lay rails?

In order to answer this question, it is necessary to ascertain the origin of the right of the prosecutor to lay rails in the city.

It appears that, in 1859, John H. Bonn and others made themselves a corporation, so far as they could do so, under

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State v. Council of Hoboken.

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the acts for establishing manufacturing companies and the supplements thereto, under the name of the Hoboken and Weehawken Horse Railroad Company, and were authorized, by ordinance of the city council, passed January 3d, 1860, to lay tracks and rails, and run cars through the city. Various regulations of the right granted were inserted in the ordinance, and, among others, three sections, similar to the third, fourth and seventh of the ordinance of June 26th, 1861, which vary only the amount of the license fee and the time of running cars.

It was further provided, by the 12th section of this ordinance of 1860, that it should not be binding on the city nor go into effect until the railroad company executed such an instrument in writing, agreeing, on their part, to perform all the conditions and requirements of the ordinance, as should be approved by the mayor and corporation attorney, and not until such instrument and approval should be filed by the city clerk.

The railroad company did not comply with the terms of this twelfth section, and therefore did not acquire any right by virtue of the ordinance, nor were they subject to its provisions.

On the fourteenth of February, 1860, the prosecutors were incorporated by special act of the legislature. In the preamble to the act, the organization under the laws for incorporating manufacturing companies and the ordinance of January, 1860, are referred to, and, by the seventh section, the company are invested with all the powers necessary to survey, lay out, construct, and operate a horse railroad, from some point in the city near the ferry gates, "through such streets of the city as by said ordinance are designated;" and by the 16th section, the said "ordinance is confirmed and declared valid and effectual *to grant* to the said company the rights, privileges and franchises therein given and granted, and that the same shall be so construed in all courts and places; *provided however*, that nothing herein contained shall prevent the said the mayor and council of said city, *with the*

State v. Council of Hoboken.

*consent of said company*, from passing and approving an ordinance, and they are hereby authorized to pass and approve an ordinance altering the said terms, conditions, and stipulations in the said ordinance contained."

It would be perhaps difficult to determine whether the legislature intended, by this 16th section, to incorporate the provisions of the ordinance, and make it in effect a part of the charter or not. If they did, the words are inapt for that purpose. But it is not necessary to decide whether it is binding upon the railroad company or not. That ordinance is not before us for review; and assuming that it is valid and binding upon the railroad company in all its features, it does not give any authority to pass any other ordinance on the same subject containing the same or different provisions. The city council, by the terms of the 16th section, can pass no ordinance affecting the interests of the railroad company without their consent. The ordinance of 1861 and the supplements vary in material respects that of 1860, and so far at least are clearly illegal, without reference to what follows in the next section of the charter. By that section it is enacted that nothing contained in it shall prejudice the rights now vested in the Bergen Turnpike Company, but the said railroad company may exercise not only the powers given, but with the consent and mutual contract of said company and the Bergen Turnpike Company, may purchase, lease, and use for a consideration, and hold, enjoy and exercise all the franchises and powers given to the Bergen Turnpike Company by a supplement to their charter, approved March 5th, 1858. *See on Laws* 213.

By this supplement, the turnpike company are authorized to lay down upon their road, or any part thereof, such track or tracks of iron rails as they may deem necessary; and that they shall have power to purchase, with the funds of the company, such cars, horses, &c., as may be proper and necessary to run on said tracks.

By a statement of facts filed with the papers in the case, not signed, but which is understood to be agreed to by the

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State v. Council of Hoboken.

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parties, it appears that the railroad company did, in 1860, lease from the turnpike company their franchise, and that the rails of the prosecutors' road in Hoboken are laid upon the turnpike road, as laid out and constructed fifty years ago, and that the tracks were laid by the prosecutors, by virtue of their charter and the lease to them from the turnpike company.

By this lease, the railroad company acquired the right to lay rails independently of the ordinance of 1860, and without the consent of the city council. This right is not affected by any condition in the charter of the prosecutors, if such condition was intended to be imposed.

2. Has the legislation of the state given to the city authorities such power over this railroad company as is attempted to be exercised by the ordinance of 1861?

The charter of the city gives all the usual municipal powers of legislation, as to establishing a police, for promoting the health and safety of the city, for providing and regulating lights, water, streets, removing nuisances, licensing hack and omnibus drivers, &c., and many other matters, but none which include such legislation as is contained in the ordinance of 1861.

But it is contended that such power is given by the 11th section of a supplement to the city charter, passed March 15th, 1861. *Session Laws*, 526.

By this section, it is enacted, that "it shall be lawful for the council, by general ordinance, to grant permission to any person or persons, or corporation, to lay railroad tracks and run cars thereon in and over any street or highway within said city, under such licenses, conditions, and restrictions as the said council may think proper, and to alter, change, or revoke the same at pleasure; *provided*, that no such grant or permission shall be made or given until a majority of the property owners along the line of such street or highway shall have first given their consent in writing for such railway track to be laid."

The right to lay the railroad tracks of the prosecutors



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Harwood ads. Smethurst.

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existed, and they were in fact laid, as appears by the state of facts above referred to before the passage of this supplement, and it is manifest that this right and these tracks are not intended to be affected by it. The terms of the whole section show that it was intended to be prospective only, and it therefore gives no power whatever over existing rights or roads.

The sections of the ordinance of 1861, and such parts of the supplements as are above referred to, should be declared void, so far as they affect the prosecutors in this case.

Order accordingly.

CITED in *North Hudson Co. Railway v. Hoboken*, 12 Vroom 77. .

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HARWOOD ADS. SMETHURST.

1. Service of a notice of trial at the office of the attorney, who was absent in Europe, and on the plaintiff also, held good.
2. The defendant noticed for trial an action of replevin; the plaintiff not appearing, a verdict was taken for defendant. *Held* irregular, and verdict set aside. A nonsuit should have been entered, and the damages then assessed.
3. An *ex parte* affidavit allowed to be read on the motion to set aside verdict.

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Argued before Justices HAINES and ELMER.

This is the action of replevin, reported 5 *Dutcher* 195, the defendant having noticed the case for trial, and taken a verdict, in the absence of the plaintiff, at the December Cape May Circuit.

*A. Browning*, for plaintiff, moved to set the verdict aside as irregular, and insisted that the defendant ought to prove the notice of trial now. He referred to 1 *Halst.* 151; *Nix. Dig.* 624, § 4; 2 *Arch. Prac.* 72; 1 *Wilson* 300; 2 *Saund.* 336, *b.*; 1 *B. & C.* 110; *Barnes* 458.

*F. Kingman*, for defendant, referred to 3 *Harr.* 297.

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Harwood ads. Smethurst.

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He asked to have the *postea* amended by entering a nonsuit and entering an assessment of the damages, as was done in the cases cited on the other side.

The judge before whom the case was tried reported that *Mr. Woodhull* informed the court that the plaintiff was not present, and no counsel appeared for him. The defendant's attorney then produced an affidavit that he had served a notice of trial in due time, by leaving the same at the office of plaintiff's attorney, in Camden, with a gentleman in charge named Gilbert, the attorney being absent out of the state. He also stated that when he asked Mr. Gilbert if that was Mr. Dudley's office, he answered it was; but when he handed him the notice of trial, he declined receiving it, saying he had no authority to do so. It was a fact of general notoriety that Mr. Dudley, who stood on the record as plaintiff's attorney, had been absent more than a year, and held the office of United States consul at Liverpool, England. The notice was also served in due time on the plaintiff in person, and on Mr. Browning, who had acted as plaintiff's counsel, and had the case in charge. The court then decided that the notice of trial had been properly served, and ordered on the trial. *Mr. Woodhull* then produced an affidavit of Mr. Browning, setting forth his inability to attend the circuit, in consequence of the effect of an accident, whereby his limb had been broken, and praying an adjournment. Mr. Kingman, stating that he proposed to take a verdict for nominal damages, the court allowed him to proceed subject to the opinion of the court at bar. The court also expressed a doubt whether the true course was not to enter a nonsuit, the plaintiff not being in court, but Mr. Kingman insisted upon taking a verdict. The issue to be tried being on the plea of *non cepit*, and there being no proof of a taking, the jury was directed to find a verdict for defendant, and to assess his damages at six cents, with six cents costs.

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Harwood ads. Smethurst.

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The opinion of the court was delivered by

ELMER, J. We think there is no necessity for the defendant to prove his notice of trial here, that having been done to the satisfaction of the court at the circuit. The regularity of the notice may however be reviewed here, as other decisions at the circuit are reviewed, upon the application of the party who complains. This, we suppose, is the meaning of the case of *Boqua v. Ware*, 1 *Halst.* 151.

The decision of the judge, as to the sufficiency of the notice, we think was correct. It is held in England that, if the attorney's place of abode be unknown, the notice may be served on the party. *Tidd's Pr.* 753. In this case the attorney on the record, although absent in the fulfilment of a public duty, kept his office in this state open, and we have no evidence that he had "ceased to act," within the meaning of the statute. *Nix. Dig.* 624, § 4.\* It would be unjust to him so to hold upon the mere ground of his absence. Had he chosen in fact to withdraw from the case, the plaintiff could have substituted another attorney; but having neglected to do this, we do not think he should be permitted to object to a notice, of which he was in due time fully apprized.

The verdict is clearly irregular. There cannot be a judgment, as in case of a nonsuit under the statute, for not going to trial, because in replevin the defendant may notice the cause himself; *Broderick ads. Ames*, 3 *Harr.* 297; but all the cases and books of practice show that, if the plaintiff does not appear, in cases not within the statute, *Nix. Dig.* 694, § 13, the regular course is to enter a nonsuit, and then proceed to assess the damages, by means of the jury in the box or by a writ of inquiry, in pursuance of the statute. *Nix. Dig.* 274, § 12,† in substance the same as 21 *Hen.* 8, c. 19; *Harcourt v. Weekes*, 5 *Mad.* 77. Whether the damages thus assessed may be actual damages, as compensation for trouble and expense, we are not called on to decide. See *Salk.* 95.

The mode of proceeding, however, is so purely formal

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\* *Rev.* p. 849, § 6. † *Rev.* p. 975, § 27, amended.

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Council of Jersey City v. Chase.

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that we should not hesitate to follow the precedents referred to, by refusing to set the verdict aside, unless the plaintiff would consent to a nonsuit being entered, did it not appear, as well from what took place at the circuit as from the plaintiff's affidavit, now produced, that but for the indisposition of his counsel, he had intended in good faith to produce evidence on the trial he is advised was material for his defence. The objections made to reading this affidavit we do not think well taken. This is, we think, like motions for a rule to show cause or for a nonsuit, one of those matters of course, excepted from the operation of *Rule 58*.

The verdict must be set aside as irregular, the costs of the circuit to abide the event.

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MAYOR AND COUNCIL OF JERSEY CITY v. CHASE, TAYLOR,  
AND KEENAN.

1. In an action on a constable's bond, a rule for the assessment of damages in open court or for a writ of inquiry, under the practice act and supplements, is not authorized.
  2. If neither party applies for an assessment of the damages by a jury, the court will assess them; if either party does so apply, a writ of inquiry will be awarded, which in this case was ordered to be executed before a judge at the circuit.
  3. If damages are claimed for a person other than the original prosecutor, upon a special notice, before the writ issues, the damages sustained by him will be ordered to be assessed by the same jury.
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This was an action of debt brought upon a constable's bond. Judgment by default, for want of a plea, was entered by the plaintiff, and on application of the defendant, a writ of inquiry for the assessment of damages was ordered.

The plaintiff moved that the rule for a writ of inquiry be dismissed, as not being authorized by the statute; and, also, that the plaintiff's damages be assessed by the court. It was also moved that the court assess the damages alleged to have been sustained by another person through default of the constable, due notice of such motion having been given.



## Council of Jersey City v. Chase.

These motions came on to be heard before the branch court, at November term, 1862, and were argued before Justices HAINES, BROWN, and ELMER, by *S. B. Ransom*, for the plaintiffs, and *N. G. Shright*, for the defendants.

The opinion of the court was delivered by

ELMER, J. This is an action upon a constable's bond, in which judgment was entered by default, for want of a plea, during the last vacation. Prior to the entering of judgment, the attorney for defendants, having filed an affidavit, in pursuance of the supplement to the practice act of 1858, 3 *Nix. Dig.* 683, § 247,\* entered a rule for a writ of inquiry. On behalf of the plaintiffs, it is now moved to strike out this rule as unauthorized, and that the damages sustained by the prosecutors of the bond, and set forth in the declaration, be assessed by the court. A motion, upon special notice, has also been made, that the court assess the damages alleged to be sustained by another person, by reason of a default of the constable.

It is plain that the several provisions of the practice act, and the supplements thereto, 3 *Nix. Dig.* 663, § 112; 683, § 247,† do not apply to the case of an action on a bond with a special condition, and that the defendant's rule must be vacated.

By the third section of the act respecting constables, *Nix. Dig.* 119,‡ it is enacted that actions on their bonds shall be conducted and prosecuted, in every respect, as suits on sheriff's bonds are by law directed to be prosecuted. This court held, in the case of *The State v. Hamilton and Edsall*, 5 *Halst.* 190, that no assignment of the breaches on the record was necessary in such a case, but that the uniform practice was for the court to assess the damages. Now such breaches as show that the condition of the bond has been broken, are required to be assigned in the declaration, *Nix. Dig.* 638, § 148,§ and this has been done in the present case.

The fourth section of the act respecting constables pro-

\*Rev., p. 872, § 151. †Rev., p. 872, § 151. ‡Rev., p. 149, § 3. §Rev., p. 565, § 121.

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Council of Jersey City v. Chase.

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vides, that assessments of damages, in and by this act directed to be made by the court, shall be made by a jury, upon application of either party interested, and the defendants now apply to have the benefit of this privilege in regard to all the damages claimed. This privilege, we think, applies as well to the damages assigned in the declaration, as to those claimed for a person who did not originally join in the prosecution, and the defendants having now applied to have it allowed to them, we see no reason why the damages may not all be conveniently assessed, by virtue of one writ of inquiry framed to meet the case. Whether the writ shall be executed in the usual way by the sheriff alone, or before a judge at the circuit, is in the discretion of the court. 2 *Arch. Prac.* 23. Inasmuch as questions of law may arise proper to be decided by a judge, we think it safest to order the writ to be executed before the judge of the county in which the *venue* is laid, at the regular term of the Circuit Court. The proceedings in actions on sheriffs' and constables' bonds are very similar to those on bonds to the Ordinary, the difference being that in the latter case the Prerogative Court ascertains and directs how much money shall be levied and made on the execution, while in the former, this is done by the court in which the prosecution is. Either party has an absolute right to have the assessment made by a jury in the case of a constable's bond; but in the case of a sheriff's bond this court will assess the damages, unless for special reasons a jury shall be allowed. In both cases the judgment is entered for the penalty and costs, and when the damages are ascertained, a special rule will be made, that the execution, which in form follows the judgment, be endorsed to levy and make the sums due to each person who has sustained damages by the default of the officer.

Let a rule be entered that the plaintiffs have leave to assign and put on file new breaches, applicable to the case of the persons who are alleged to have sustained damages which are not assigned in the declaration, and suggesting the application of the defendants that the damages be assessed by

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Meyer v. Beardsley.

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a jury; and that thereupon a writ of inquiry issue, directed to the sheriff of the county of Hudson, commanding him to summon twelve good and lawful men of his county to appear at the next Circuit Court to be holden in and for the said county; then and there, in the presence of the judge of said court, to inquire what damages the said persons have respectively sustained by occasion of the premises.

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CHRISTOPHER MEYER v. WILLIAM BEARDSLEY, JUN.

1. When the drawee of a bill of exchange writes upon it "accepted," or words of like import and design, and signs it, it is a response to the request therein contained; and the language of the bill and the acceptance are but parts of one entire contract in writing, and the responsibility of the acceptor is like that of a maker of a note—he is treated as a primary debtor.
  2. The rule excluding parol evidence tending to vary the nature of the contract, and convert an absolute into a conditional contract, applies to an unqualified acceptance in writing.
  3. To constitute an acceptance, no special words are necessary. The signature alone of the drawer across the face of the bill will constitute a written acceptance.—*Per VREDENBURGH, J.*
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This was an action of assumpsit brought in the Middlesex Circuit Court by William Beardsley, jun., as endorsee, against Christopher Meyer, as acceptor of a bill of exchange, drawn on him by F. Lunt, for \$1240, payable at two days' sight, to the order of Charles Beardsley and Brothers, dated at St. Louis, March 12th, 1861.

On the face of the bill, and across it, were the following words: "Excepted, April 22d, '61. Meyer."

The plaintiff declared upon the bill in the usual form, adding the common counts. The defendant pleaded the general issue, and the cause was tried in the term of September, 1861. The draft and acceptance having been proved, the defendant offered evidence to show that the acceptance

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Meyer v. Beardsley.

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was conditional, and that the condition had not been performed.

The court, at the instance of the plaintiff, overruled the evidence thus offered, and thereupon a bill of exceptions was prayed, and allowed and sealed by the court. The bill of exceptions, omitting the formal parts, is as follows:

“Whereupon the defendant offered to prove as follows:

“Some time prior to the date of the draft, the defendant agreed with F. Lunt, the drawer, to loan him five thousand dollars, to be secured by the drawer on certain real estate in St. Louis, where the drawer resided. The drawer represented the property to be free of encumbrance. Defendant caused an examination of the record of the title to be made, and ascertained that the property was largely encumbered by judgments and mortgages to its full value, or nearly so, and declined making the loan. Lunt thereupon promised to have the judgments and mortgages cleared off and removed, and to send to defendant satisfactory evidence that the property was free from encumbrances. This he never did, and has not yet done. This was all prior to the date of the draft. The draft was presented for acceptance about the 15th of March, A. D. 1861. Defendant refused to accept, and gave to the agent of the plaintiff, a clerk in his employ, who presented the draft for acceptance, as a reason, that the security offered by the drawer was not satisfactory, and he had not sent the papers he promised. Between the 15th of March and the 22d of April, the draft was repeatedly presented by the same agent for acceptance, which was refused for the reason above stated. On the 22d April, the draft was again presented by the same agent. Defendant at first refused to accept it, but finally, to avoid the trouble and necessity of plaintiff sending the draft almost daily for acceptance, the defendant agreed to, and did accept the draft, to be paid on condition that the defendant received from the drawer the county clerk's certificate, or other satisfactory evidence, that the property was free and clear of encumbrances. In the interval, between the 15th March and the



Meyer v. Beardsley.

22d April, the defendant had an interview with the plaintiff, in which he explained to the plaintiff the reason why he refused to accept the draft, as herein before stated. Plaintiff said we, that is, Charles Beardsley and Brothers, of whom plaintiff is one, had taken the draft on account of a previous debt due from Lunt. The draft was afterwards presented for payment which defendant refused, as he had not received the promised papers or evidence from Lunt, and the encumbrances had not been cleared off and removed."

The jury rendered a verdict for plaintiff, under the direction of the court, on which judgment was entered.

The defendant brought his writ of error, and assigned for error the refusal of the court below to admit in evidence the facts he had offered to prove as a defence against the action.

For the plaintiff in error, *H. V. Speer*.

For the defendant, *A. V. Schenck*.

CHIEF JUSTICE. Where the drawee of a bill of exchange writes upon the bill the word accepted, or any words of equivalent import, and signs it, it is a response to the request contained in the bill that he will pay the money mentioned in it, and requested to be paid, as therein directed. The language of the bill and the acceptance are but parts of an entire contract in writing, all the terms of which are expressed in writing with just as much certainty as if the acceptor was the maker of a note for the amount. The responsibilities of the acceptor are like that of the maker of a note—he is treated as the primary debtor.

The rule excluding parol evidence tending to vary the nature of the contract, and convert an absolute into a conditional contract, applies in full force to an unqualified acceptance in writing.

This acceptance is an absolute contract in words to pay according to the tenor of the bill; it is not a contract implied by the law as the result of a certain act of the party, as an

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Meyer v. Beardsley.

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endorsement of a note or bill ; such an endorsement is, until filled up, no contract in writing, and cannot be recovered upon. *Johnson v. Martinus*, 4 *Halst.* 144 ; *Watkins v. Kirkpatrick*, 2 *Dutcher* 85 ; *Susquehanna Bridge and Bank Company v. Evans*, 4 *Washington's C. C.* 480.

But none of the cases cited support the position, that the express engagement of the party to a bill or note reduced to writing may be varied by a contemporaneous parol agreement, showing a contract of a different legal import. 1 *Mee. & Wels.* 374 ; *Adams v. Wordley* ; *Heaverin v. Donnell*, 7 *Smedes & Mar.* 244 ; 1 *Pars. Notes and Bills* 201 ; *Spring v. Lovett*, 11 *Pick.* 416 ; *Hanson v. Stetson*, 5 *Pick.* 506 ; *Goodwin v. McCoy*, 13 *Ala.* 261 ; *Hoare v. Graham*, 3 *Camp.* 57.

At one time, in England, it seems to have been considered an open question whether an unqualified acceptance in writing might not be shown by parol to have been qualified. *Bayley on Bills*, c. 6, § 1.

But I think the case of *Adams v. Wordley*, already cited, must be regarded as settling that question there, and I am not able to distinguish such an acceptance from a promissory note, upon which the law must be regarded as well settled upon this point, in addition to the cases already cited. *Ridout v. Bristow*, 1 *Tyrw.* 84 ; *Farnham v. Ingham*, 5 *Ver.* 114 ; *Woodbridge v. Spooner*, 3 *B. & Ald.* 223, may be referred to.

In the present case, the bill before acceptance was drawn by one Sims, to the order of Charles Beardsley & Brothers, of whom plaintiff was one, and taken by them on account of a debt due from Lunt to them. The condition sought to be proved was, that the bill was not to be paid until Lunt showed a clear title to some property in St. Louis, upon which Lunt was to secure Meyer, the acceptor, for the advance. Meyer at first refused to accept, because the title was not shown to be clear, but afterwards did accept upon the condition stated. Lunt never showed a clear title, and Meyer refused to pay. The court below overruled the evidence, and did so rightly.

It was insisted, in this court, that there was no considera-

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Meyer v. Beardsley.

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tion for the acceptance, and that therefore the plaintiff could not recover.

The bill was not an accommodation bill between Lunt, the drawer, and Charles Beardsley & Brothers, the payees. It was given to them to pay a precedent debt. That is a sufficient consideration to support the acceptance. Want or failure of consideration, if the latter be entire, may be a defence between the promisor and his immediate promisee, and generally is but the acceptor of a bill of exchange and the payee do not stand in the position of immediate parties of promiser and promisee. The payee stands in the position of a stranger to the acceptor, as to the consideration of the bill. *Robinson v. Reynolds*, 2 Q. B. 196.

It is of no consequence that the payee of a bill knew that there was no consideration for the acceptance, as between the drawer and acceptor; if the payee or subsequent holder gave a *bona fide* consideration for it it is enough, and entitles him to recover. *Smith v. Knox*, 3 Esp. R. 46; *Powell v. Waters*, 17 Johns. 176; *Bank of Rutland v. Buck*, 5 Wend. 66.

There is no pretence of fraud in this case. The plaintiff is an innocent holder for the precedent debt due the firm of which he was a member; that was a sufficient title to enable him to recover.

The judgment should be affirmed.

OGDEN, J. The suit was brought by the endorsee against the acceptor of a bill of exchange. The bill is dated St. Louis, Missouri, March 12th, 1861, payable at two days' sight, made by F. Lunt in favor of the order of Charles Beardsley & Brothers, for the payment of twelve hundred and forty dollars, and drawn upon C. Meyer, New Brunswick, N. J., who accepted the same generally in writing, on the 26th of April, 1861. It was endorsed by the payees over to William Beardsley, jun., the defendant in error.

The bill of exception was sealed, upon the refusal of the judge of the Circuit Court to admit the defendant below to prove, that an oral condition was connected with the written

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Meyer v. Beardsley.

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acceptance, that it was not to be paid unless he, Meyer, should receive from the drawer satisfactory evidence that his property in St. Louis was free and clear of encumbrances. The acceptance is absolute on its face, made upon a negotiable instrument, which, by the form of it, became payable in five days from the date of the acceptance; and the defence insisted on was, that there was a contemporaneous verbal agreement that it should not be paid until the acceptor received certain documents from the drawer. The question presented to this court is, whether an acceptance of a negotiable instrument, absolute on its face, can be shown to be conditional by parol? It was not pretended, in argument, that such proof could be given in a suit brought by an endorsee who was a third party; but as the plaintiff below was one of the firm of Beardsley & Brothers, it was urged that he held the paper both for acceptance and collection. Can such an acceptance be qualified by parol in the hands of the payees? The great weight of authority is against the admissibility of the testimony, because its admission would contradict the terms of the written contract.

The case of *Adams v. Wordley*, 1 M. & W. 374, was an action by the drawee against the acceptor. The defence set up was an agreement, not in writing, that the plaintiff stipulated not to call upon the defendant until an action against a third party was determined. The judges overruled the defence, upon the ground that, by a parol contemporaneous agreement, it sought to alter the absolute engagement entered into by the bill—declaring in their opinions, given *seriatim*, that it would be very dangerous to allow a party to alter, in such a manner, the absolute contract on the face of a bill of exchange, as it would be incorporating with a written contract, an incongruous parol condition, which is contrary to first principles. The subject is very fully discussed in *Parsons on Notes and Bills*, where all the authorities cited on this argument are referred to, and very many others. The learned author states the law to be, that the maker of an absolute note cannot show against the payee, and *a fortiori*,



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Meyer v. Beardsley.

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not against any endorser, an oral contemporaneous agreement, which makes the note payable only on a contingency. To illustrate: "It cannot be shown that an absolute acceptance was conditioned orally, upon the drawer's finishing certain work undertaken for the drawee, or that a note was payable, only in case the sale of a lot of land was suspended." So also, that a mutual understanding of the parties, at the time a note was given, that if the value of the goods sold should turn out less than supposed, the note should be void, is no defence. The doctrine maintained by the author referred to, applies only to cases where the instrument is absolute and complete in its terms, and leaves nothing to be supplied by oral evidence to make an entire and intelligible stipulation. A conditional acceptance, made to depend upon the happening of a future event, is in fact only a promise to accept absolutely when the contingency shall happen, and it is a different contract from an acceptance absolute on its face.

The judgment below should be affirmed with costs.

VREDENBURGH, J. This was an action brought by Beardsley, as payee, against Meyer, as acceptor of a bill of exchange, in the following words:

\$1240.

ST. LOUIS, March 12th, 1861.

Two days sight pay to the order of Charles Beardsley and Bro's twelve hundred and forty dollars value received, and charge the same to the account of F. LUNT.

The defendant, by way of defence, offered to prove by parol that at the time when the defendant wrote the words "Excepted April 22, '61. C. Meyer" across the face of the bill, he annexed to the acceptance a condition that Lunt was to furnish him satisfactory evidence that his, Lunt's, property in St. Louis was free from encumbrance before payment, which was never done. This offer the court overruled. It is now contended that the word "Excepted," written across the face of the bill, is equivocal, and not an absolute acceptance, and liable therefore to be qualified by parol testimony of what took place at the time.

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Meyer v. Beardsley.

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The writing across the face of the bill is in red ink, and in the ordinary form of an acceptance, only the word is "excepted," instead of the ordinary one accepted.

To constitute an acceptance, no special words are necessary. The signature alone of the drawee across the face of the bill will constitute a written acceptance. It is a presumption of law in this case, that the word "excepted" was used in the sense of accepted, and constitutes an absolute written acceptance, as much so as if the word accepted had itself been used. This being the legal result of the facts, it follows that no parol proof can be admitted to prove a conditional acceptance, as that would be contradicting the written evidence. 1 *Parsons on Notes* 201 and *note W*.

Upon this question I fully concur in opinion with the Chief Justice.

VAN DYKE, J., dissenting. This is an action brought by the endorsee of a foreign bill of exchange against the acceptor. The bill appears to be in the usual form, and the acceptance is without condition on its face. The signature to the bill was duly proved, but the defence offered was wholly overruled by the court. Whether this was right or not, is the question raised by the writ of error.

It appears that, previous to the making of this draft or bill of exchange, the defendant and F. Lunt, the drawer, had had some negotiations concerning the loan of a sum of money. Meyer, it seems, had agreed to loan money to Lunt, the drawer, to be secured on real estate in St. Louis, where the drawer then resided. Lunt, the drawer, represented the property to be free and clear of all encumbrances; but Meyer, the defendant, caused an examination to be made of the records of St. Louis, and found the property to be largely encumbered, to nearly or quite its full value, and declined to make the loan. Lunt then promised to have the encumbrances entirely removed from the property, and to send to the defendant satisfactory evidence that the property was free from encumbrance. This he never did; but being in-

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Meyer v. Beardsley.

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debted to the firm of Charles Beardsley & Brothers, of which firm the plaintiff is one, he drew the draft in question in their favor on the defendant. It was endorsed by the firm to the plaintiff, one of its members, and transmitted to New Brunswick, in this state, for presentation and acceptance. It is dated on the 12th of March, is payable at two days' sight, and was first presented on the 15th, by the agent of the plaintiff. The matter seems then to have been explained to the agent, and the acceptance refused on the ground that none of the securities for the contemplated loan had been furnished or made satisfactory. This presentation was several times repeated between the 15th of March and the 22d of the following April, and the acceptance was as often refused for the same reason. In the meantime, the plaintiff and defendant had an interview on the subject, at which the whole matter, with the reasons for his refusal to accept, was explained by the defendant to the plaintiff. Afterwards, and on the said 22d, of April, the draft was again presented for acceptance, and at first refused; but afterwards, to avoid the trouble of an almost daily repetition of the presentment, he accepted the draft on the condition that he would pay it if he received from the drawer the county clerk's certificate or other satisfactory evidence, that the property was free and clear of encumbrances; but no such certificate or evidence having been received, he afterwards, for that reason, refused to pay the draft when it was presented for payment.

All these facts the defendant offered to prove on the trial, but was not permitted to do so; and the question now arises, if he had done so, as it must now be presumed he could have done, could the jury, under such evidence, have lawfully rendered a verdict for the defendant? If they could, then the court was wrong in overruling it.

This is said to be a conditional acceptance, and two questions seem to be presented for consideration: 1. Can a written acceptance, absolute in its terms, be shown to be conditional by parol? 2. If this cannot be done when that simple naked question is alone presented, is there anything in this

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Meyer v. Beardsley.

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case, growing out of all the circumstances connected with it, which takes it out of the operation of that rule?

That an acceptance may be conditional, if the condition is put in writing, there can be no doubt; the cases are numerous to sustain it. But whether an acceptance that is absolute upon its face can be shown to be conditional by parol testimony is not so clear. Writers on the subject do not agree. If the paper have passed, without dishonor and in the regular course of business, into the hands of a subsequent and innocent holder without any knowledge of such state of things, it would seem to be contrary not only to justice, but contrary to all legal analogies, and dangerous and impolitic in the extreme, to permit such a defence. But when the suit is between the immediate parties to the acceptance and between the parties to the condition, who knew all about it, and all about the circumstances which led to such an arrangement, and agreed to it at the time, it seems to me that justice, sound policy, as well as legal analysis, require that the whole transaction and arrangement between them touching the acceptance should be shown.

It is said to be the contradiction of a written agreement by parol testimony. But this is not a contradiction of anything that is written; what is written of the agreement is admitted, and not denied, but it is insisting that the whole of the agreement was not reduced to writing, and that the verbal, which is in addition to and in explanation of the written agreement, should be received in evidence. This is a familiar principle. Nor can I see any stronger reason for rejecting parol testimony in explanation of the circumstances under which a bill of exchange was accepted, than in the case of the payer of a promissory note. In the latter case, he puts in writing a positive and unconditional promise to pay the note according to its terms, and thereby declares that he has received the full consideration therefor; yet he is always permitted, between himself and the payee, to show, by parol, that he never was to pay that money to him under any circumstances, and that he never did receive any con-



Meyer v. Beardsley.

sideration for it whatever. This does seem to be, in some measure, a contradiction by parol of the written agreement, and yet the law permits it to be done, and it is not easy to see why the same thing may not be done in case of a draft, where the acceptor becomes the payer, and is said to occupy much the same position as the payer of a promissory note.

But if it be true that under ordinary circumstances a condition contemporaneous with the written acceptance cannot be shown by parol, do not the whole of the circumstances, as we must suppose them to exist in this case, wholly preclude the idea that this holder can now recover of this defendant the amount due on this draft, and do they not take the case entirely out of the stringent rule contended for? I think they do. It will be observed that the case is singularly free from any equities on the part of the plaintiff for the court to sustain. The plaintiff, or his firm rather, paid no consideration for the draft. They took it on account of an old or previous debt. Whatever that previous debt may have cost them, the draft cost them nothing in addition thereto. The defendant had nothing in his hands belonging to the drawer, and never had had. He owed him nothing, and has never had any consideration for this acceptance, and no probability that he ever will. The draft was drawn upon him without any authority so to do, and he promptly refused to accept it or to recognize it. Of all this the plaintiff was fully aware, having had the matter and circumstances and cause of refusal to accept explained to him by the defendant. But after a persistence of over a month on the part of the plaintiff and his agent, of an almost daily presentment of the draft, long after it was dishonored, the defendant finally, to avoid any further trouble of presentment, agreed to accept it on the understanding and agreement between them that he would pay it if the drawer complied with his promise to furnish the securities, certificates, &c., otherwise not. Such we must understand to be the purport of what is termed the condition, to which both were parties; and now to permit the holder to recover all this money, when nothing has been

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State v. Water Commissioners of Jersey City.

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done by either him or the drawer to forward the papers, or to put the defendant in any different condition than he was when he wrote his acceptance on the doubly dishonored paper, would seem to be extraordinary in the extreme; and that he should thus suffer, because he was not permitted to give the truth in evidence, when he can prove it by his adversary, is stranger still. I think, therefore, that the evidence offered by the defendant should have been received, and if believed by the jury, should have operated as a complete defence.

Judgment of Circuit Court affirmed.

CITED in *Chaddock v. Vanness*, 6 *Vroom* 520; *Wright v. Remington*, 12 *Vroom* 55.

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THE STATE, MICHAEL MALONE, PROSECUTOR, v. THE  
WATER COMMISSIONERS OF JERSEY CITY.

1. If it appear by the return to the writ of *certiorari*, that the same subject matter has been heard and adjudged by the court on a former *certiorari*, to which the present prosecutor was a party, and that judgment thereon was rendered against him, the writ will be dismissed.
2. A party wishing a review of an assessment for a municipal improvement must exercise reasonable diligence; and if it appear that the work has been done, and the assessment for it satisfied more than three years before the *certiorari* was allowed, the court will dismiss the writ.
3. The allowance of a common law writ is a matter of discretion; and whenever, in the progress of a cause, the court discovers facts which, had they been disclosed on the application for the writ, would have induced a refusal of the *allocatur*, the court may, of its own motion, dismiss the writ.

On *certiorari*. In matter of assessment for improvements, &c.

It was moved that the writ be dismissed on two points:

1. Because the same proceedings had, by a former writ of *certiorari*, to which the present prosecutor was a party, been brought up before the court for review, and judgment thereon had been rendered.

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State v. Water Commissioners of Jersey City.

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2. That the prosecutor had lost his remedy by unavoidable delay.

The motion was argued by *C. H. Winfield*, for the prosecutor, and *R. D. McClelland*, for the defendants.

The opinion of the court was delivered by

HAINES, J. Motion is made by the counsel of the defendants in *certiorari* to dismiss the writ on several grounds, one of which is, that the whole subject matter of this suit has already been considered and adjudged. The return to the writ sets forth, that on the 7th day of July, 1859, a writ of *certiorari*, issuing out of this court at the relation of Michael Malone, the present prosecutor, and others, was directed to these defendants, requiring them to send up all the proceedings of the defendants touching the construction of a certain sewer in Jersey City, with certain laterals and additions thereto; that in pursuance of the command of the said writ, they did certify and send to this court the resolution of the mayor and common council of Jersey City, directing these defendants to construct the said sewers, and all the proceedings touching the same, as they then remained before them, and that they are the same proceedings and record which, by the writ in this case, they are required now to certify and send up. And they further certify, that such proceedings were thereupon had in this court that the proceedings of the defendants in relation to the said sewers were in all things affirmed. And it is further certified, that the said Michael Malone, with other prosecutors, removed the record of this court to the Court of Errors and Appeals, where the judgment of this court upon the said proceedings of the defendants was in all things affirmed, and the records remitted to this court, where the same now remain; and that, in consequence thereof, the said proceedings and record do not remain before them, and that they are not able to send up the same to this court at this time.

On the return so made there was no allegation of diminution

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State v. Water Commissioners of Jersey City.

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tion of the record, nor rule to correct or perfect it, and we are left to presume that the return is in accordance with the facts of the case. If that be so, then it appears that on the relation of Michael Malone, among others, the subject matter of the present suit has already been heard and adjudged by this court, and judgment rendered thereon against the prosecutor. He has once been heard, and has no right to be heard again, nor to vex the defendants a second time for the same cause, and this is a sufficient reason for dismissing the writ.

Another objection is, that the writ of *certiorari* in this case was improvidently granted. If the return to the writ now made is not in accordance with the facts, and the prosecutor has not already been heard, and the subject matter in all things adjudged, then it appears, by the depositions read without objection, that the sewer, and its laterals and additions thereto, had been completed, and were in actual operation in the month of May, 1859; and that the assessment of the expenses of the same was at the time approved and confirmed. The prosecutor sued out the present writ to review the proceedings, and procured its allowance at the term of June, 1862, more than three years after the work was done and assessment ratified. A party who desires a review of such proceedings should exercise reasonable diligence in having it done. There is neither reason nor justice in his standing by, while a large expenditure is being made for a supposed public benefit, and after it is completed, to enjoy the benefit, and then, for some supposed or real error or informality, to have the proceedings and the assessment against him set aside, and so save himself from his share of the expense. It is to be presumed that when the writ was allowed the court was not informed of these circumstances, or else that, in the exercise of its discretion, the writ would have been refused. Such motions are usually made *ex parte*, and must be at the risk of the party making them. It has frequently been held that the allowance of a common law writ is a matter of discretion, and that whenever, in the progress of the cause, the court discover facts which, had they been disclosed on the application for the writ would have induced a refusal of the *allocatur*, the court may, *ex mero motu*,



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 Reford v. Cramer.
 

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dismiss the writ. *Haines v. Champion*, 3 *Harr.* 51; *State v. Kingsland*, 3 *Zab.* 85; *State v. Everett*, *Id.* 370; *State v. Woodward*, 4 *Halst.* 21.

In the case of *The State against Ten Eyck*, 3 *Harr.* 373, the court dismissed the writ, because the party prosecuting it had suffered three terms of the court to pass after the return of a public road, before he applied for its allowance. The three years which in this case had elapsed, between the completing of the work with the assessment, and the application for the writ, is such a period as, if known to the court, would have induced a denial of the *allocatur*, and is a good cause for dismissing.

Let the writ be dismissed with costs.

CITED in *State v. Council of Newark*, *infra* 306; *State v. Blauvelt*, 5 *Vroom* 263; *State v. Gardner*, 5 *Vroom* 329; *State v. Jersey City*, 7 *Vroom* 194; *State, Wilkinson, pros., v. Trenton*, 7 *Vroom* 506; *State v. Essex Public Road Board*, 8 *Vroom* 337; *State, Grant, pros., v. Clark*, 9 *Vroom* 103.

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 THE STATE, MICHAEL MALONE, PROSECUTOR, v. THE  
MAYOR AND COMMON COUNCIL OF JERSEY CITY.
 

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HAINES, J. This cause being in all things like that of *The State against The Water Commissioners of Jersey City*, determined at this term, for the like reasons, must receive the like judgment, and the writ be dismissed with costs.

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 JAMES A. REFORD v. GEORGE CRAMER, EDWARD PIER-  
SON, AND GEORGE S. CORWIN.
 

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1. That part of the sixth section of the act in regard to insolvent debtors (*Nix. Dig.* 378,)\* which requires the debtor's conduct to be fair, upright, and just, must be restricted to his conduct in making his account and inventory, and in delivering up to his creditors all his estate, and does not apply to the conduct of the debtor in contracting his debt.
2. If the debtor has made a conveyance of his real property to his wife, although before the debts were contracted, it is a question for the jury whether such conveyance was made with intention to defraud his

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\* *Rev.*, p. 499, § 11.

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Reford v. Cramer.

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creditors. Such conveyance is not *per se* fraudulent and void; yet, if not made *bona fide* and for the benefit of the wife, but with a fraudulent intent, it comes within the provision of the tenth section of the insolvent act, and is a good bar to the defendant's discharge.

*Certiorari* to the Common Pleas of Essex. In matter of insolvency.

This case was argued before Justices HAINES and ELMER.

For the plaintiff in *certiorari*, *W. K. McDonald*.

For the defendant, *C. L. C. Gifford*.

The opinion of the court was delivered by

ELMER, J. The plaintiff in this *certiorari* applied to the Court of Common Pleas of the county of Essex for the benefit of the insolvent laws. At the hearing of the case, July 1st, 1861, the court would have discharged him, but for the filing of an undertaking by the defendant, pursuant to the 8th section of the act. *Nix. Dig.* 378.\* The plaintiff having declared as directed by the 9th section, the defendant pleaded thereto; issue was joined, and the case brought to trial before a jury.

Among other things proved on the trial, it appeared that, on May 4th, 1858, a deed was made to the plaintiff's wife for a house and lot, situated in Bloomfield, which it was alleged, on behalf of the defendant, was designed fraudulently to cover up the property, and keep it free from the claims of plaintiff's creditors.

It further appeared that, in April, 1858, the plaintiff rented a paper mill in Morris county, and shortly afterwards he began to deal with Cramer and Pierson, who were partners and merchants in Morristown, and paid his indebtedness to them in full up to October, 1858. They afterwards obtained a judgment against him in the Essex Circuit Court for a debt contracted after the last mentioned day, and have filed a bill in equity to set aside the conveyance to plaintiff's wife as

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\**Rev.*, p. 500, § 13.

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Reford v. Cramer.

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fraudulent. Corwin, the other defendant, obtained a judgment on a promissory note, endorsed by him for plaintiff's accommodation, May 4th, 1859, which note was given for the rent of the mill from October 1st, 1858, said defendant being at the time plaintiff's partner in the manufacture of paper. The said defendant also became the assignee of another judgment against plaintiff, obtained for a debt contracted in 1859, upon which said defendant was security.

There was evidence that the plaintiff, in May, 1858, and subsequently, represented to his creditors that he had property in Bloomfield, for which he had been offered three thousand dollars; that it was worth three to four thousand dollars, and was not encumbered. The plaintiff denied that he had ever made any such representations.

The court charged the jury, among other things, as follows: "If you believe, from the testimony, that Reford, after making conveyance of his property, represented himself as still the owner of it, for the purpose of obtaining credit, and did obtain credit on the faith of such representations knowing them to be false, then there is evidence going to show that his conduct has not been fair, upright, and just; and if you should be satisfied of this, your verdict should be in favor of the creditors, and no further examination of the case would be necessary."

The jury returned a verdict for the creditors, and judgment was rendered that the debtor be continued in custody until thence delivered by due course of law, as provided by the statute.

A state of the case having been agreed upon and returned, in answer to the *certiorari*, disclosing the above facts, it is now insisted that the charge of the court to the jury was erroneous.

The design of the insolvent act, as set forth in the first section, is that a person in confinement for debt, who is willing to deliver up to his creditor or creditors all his estate, both real and personal, toward the payment of his creditor or creditors, shall obtain his discharge in the manner therein

## Reford v. Cramer.

set forth. As one of the means of ascertaining his willingness to do so, the debtor is to be examined in open court and upon interrogatories, touching and concerning the disposition of his estate, the truth and fairness of his accounts and inventory, and also in regard to his confinement, to ascertain whether it was compulsory or voluntary, or whether he had been without the prison limits. If after the hearing, the court and creditors shall be satisfied that the conduct of the debtor has been fair, upright, and just, he shall make an assignment of his property, and forthwith be discharged. But if the creditors, or any of them, are not satisfied with the truth and honesty of the declaration and confession of the debtor, nor with the truth and fairness of the accounts and inventory exhibited, and such creditor shall undertake to the court to prove, by the first day of the term, that such debtor has concealed and secreted some part of his estate, and has not fairly, fully, and honestly delivered up to the use and benefit of his creditors the whole of his estate, the debtor shall be remanded, and the question submitted to trial by a jury.

To effect this object, the act prescribes the form of a declaration and plea, whereby the question is put in issue whether the plaintiff has well and truly complied with the insolvent act in all things on his part for the use and benefit of his creditors. From the several provisions of the act, as before enumerated, I think it is manifest that the general words used in the 6th section, which require the debtor's conduct so be fair, upright, and just, must be restricted to his conduct in making his account and inventory, and in delivering up to his creditors all his estate. This construction is indicated not only by the provisions I have enumerated, but also by the 20th section, which enacts that every insolvent debtor, having given up all his estate and conformed in all things to the directions of the act, shall for ever be discharged from his debts, so far as regards the imprisonment of his person. And this view of the act was evidently taken by this court in the cases of *Smick v. Opdycke*, 7 *Halst.*



## Reford v. Cramer.

347, and *Wallace v. Coil*, 4 Zab. 602. The 10th section of the act, I think, confirms the same construction. It was not originally a part of the act for the relief of persons imprisoned for debt, but was the 4th section of an act, passed in 1830, abolishing imprisonment for debt in certain cases. It enacts, that if it shall appear to the satisfaction of the court, or by the verdict of a jury, that the debtor has concealed or kept back any part of his estate, or made any conveyance, deed, or mortgage, judgment, sale, transfer, assignment, or other disposition of his estate, with intent to defraud his creditors, then he shall be refused his discharge. Upon the revision of the statutes, in 1846, it was incorporated with the insolvent debtors act, to which it properly belongs; and, read in connection with the other provisions of the act, makes it the duty of the court or the jury to inquire whether by any such means the debtor is seeking to keep back his property. But there is no indication here, or in the other provisions of the act, that the conduct of the debtor in contracting his debt is to affect his discharge.

It is by the act respecting imprisonment for debt in cases of fraud (*Nix. Dig.* 354,)\* that the fraudulent conduct of the debtor in contracting the debt, is made a subject of inquiry. This is for the purpose of subjecting him to arrest upon a *capias*, and contains no reference to the subsequent proceedings to discharge. It certainly was not the design of this act, that a debtor, once properly arrested, should never be discharged. As to the charge in regard to the conveyance of the house and lot to the plaintiff's wife, which is also complained of as erroneous, it is sufficient to remark, that it was a proper question for the jury whether the conveyance to the wife was made with the intent to defraud these creditors. Although made before the debts in question were contracted, and not *per se* fraudulent and void, yet if not made *bona fide* and for the benefit of the wife, but with a fraudulent intent, it came within the provisions of the 10th section of the insolvent act, and was a good bar to the defendant's discharge. The precise circumstances of the case

\* *Rev. p.* 857, § 68.

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Rutan v. Hinchman.

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are not so before us as to enable us to judge how the fact was, nor is it our province to interfere with the decision of the jury.

Being of opinion that the court erred, in instructing the jury in regard to the defendant's conduct, in contracting the debts he owed, the judgment must be reversed, and the proceedings remitted to the Court of Common Pleas, that there may be a new trial of the issue joined between the parties.

Judgment reversed.

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HENRY K. RUTAN v. JOHN H. HINCHMAN AND HENRY HOPPER.

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An agreement to sell and exchange a horse and money for money and a piece of land, is within the statute of frauds, and an action for damages for refusal to convey the land cannot be sustained on a verbal agreement.

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On *certiorari* to the Common Pleas of Passaic county on appeal.

For the plaintiff in *certiorari*, *S. Tuttle*.

For the defendant in *certiorari*, *J. Hopper*.

The opinion of the court was delivered by

ELMER, J. The state of demand claims one hundred dollars, in an action of trespass on the case, for that plaintiffs agreed with defendant to sell and exchange with him a horse, of the value of two hundred dollars, for one hundred dollars in cash and a certain lot of land, to be transferred to them, and thereupon delivered to him the horse, and received the one hundred dollars; but the defendant refused, and neglected to convey to plaintiffs the said lot of land. A judgment having been obtained by the plaintiffs for the hundred dollars, this *certiorari* is now brought to reverse the same.

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Rutan v. Hinchman.

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Upon the trial, the only evidence of the alleged contract was verbal, it not being pretended that there was any writing. It was therefore objected then, as it is insisted now, that the case comes within that clause of the statute of frauds, which forbids an action being brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless such agreement, or some memorandum thereof, shall be in writing, and signed by the party to be charged therewith, &c.

In my opinion this objection is well taken, and the case comes within the decision in *Smith v. Smith*, 4 *Dutcher* 208. In that case there was a contract to transfer a tract of land, in consideration of the plaintiffs erecting buildings on it. The court held that no action could be brought on the contract, because it was not in writing. In that case, however, the action was not for the value of the land, but for the expense of erecting the buildings; and the court held him entitled to recover, upon the principle, that when a party to an agreement, void by the statute of frauds, fails to execute it, the price advanced on the value of the article delivered, in part performance of the contract, may be recovered back.

This principle might, perhaps, have entitled the plaintiffs to have recovered the value of the horse, over and above the one hundred dollars paid for him, had the action been so brought. But waiving the objection, that such an action in a justice's court ought to have been in debt, because the contract implied was a contract for the payment of money only, the promise to pay in land being void, the state of demand claims damages for the refusal to convey the land, and we must infer that the damages actually recovered were the value of the land, and not the value of the horse. I am, therefore, of opinion that the judgment must be reversed.

Judgment reversed.

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Sutphin v. Crozer..

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## WILLIAM B. SUTPHIN v. THOMAS CROZER.

Money bet on the result of a horse race, and deposited with a stakeholder, may be recovered back before the contract is executed.

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Error to the Circuit Court of the county of Monmouth.

The plaintiff below, Thomas Crozer, brought suit against William B. Sutphin, the defendant, to recover a certain sum of money, which had been deposited with him as a bet on the result of a horse race, on the ground that the race had never been run.

The ruling of the court on a question of evidence was excepted to by the defendant, and a bill of exceptions was prayed and allowed. The matters contained in the bill and all the facts of the case are fully set forth in the opinion of the court.

For the plaintiff, *J. D. Bedle*.

For the defendant, *Joel Parker*.

The opinion of the court was delivered by

BROWN, J. This action was brought by Crozer against Sutphin, to recover money deposited with him, as stakeholder, by Crozer, on a bet made between him and one Voorhees. The bet was made on the result of a trot between horses called Benton and Vermont, the horse taking three heats in five to be the winner.

It appeared, by the evidence of the plaintiff below, that the race commenced at the time and place appointed: each horse took one heat, when it became dark, and the judges refused to act. Benton was taken from the ground. About an hour after Crozer saw Sutphin, and demanded his deposit. The plaintiff having rested, the defendant offered to prove that but two of the judges refused to act, that the third judge remained, and Vermont trotted two other heats after



## Sutphin v. Crozer.

Benton was withdrawn, and was declared winner by the judge who remained; that according to the custom in Monmouth, the owner of Benton had no right to withdraw him, and that Vermont was the winner of the race; that the money was paid to Voorhees, as the winner, before demand made and in good faith. This offer was overruled, and a bill of exceptions signed. In the case of *Huncke v. Francis*, 3 *Dutcher* 55, the court were divided upon the question whether this action would lie against a stakeholder since the act of 1846, making him indictable for a misdemeanor to the same extent as the parties who make the bet. Two of the judges held that the stakeholder and the plaintiff, being *pari delicto*, the law should not aid either, but leave the possessor as it found him. I cannot agree to this. The maxim does not apply. The stakeholder and the gamester may be made equally guilty by the statute, but they are not in the *same fault*. The offences are collateral, but not identical.

The opinion delivered by the then Chief Justice (Green) is entirely satisfactory to my mind. The stakeholders and the bettors are not *pari delicto*, notwithstanding the act of 1846, making the stakeholder liable to indictment for misdemeanor; the stakeholder remains not guilty of betting, and the bettors not guilty of stakeholding. The bettors commit no crime by depositing stakes, but merely pay or deposit money upon an illegal contract. If that contract has not been executed, the parties, or any of them, may rescind it, and place themselves, or have the aid of the law, if necessary, in being placed *status quo ante contractum*. This doctrine is well settled.

But the question here is, has the contract been executed? The stakeholder agreed to pay the money to the winner. He did pay it to Voorhees as the winner, but, it is said, he was not the winner, and further, that the bet was not decided, the race not run. This position is well taken, unless the court will ascertain what are the rules which govern sportsmen in such cases, and decide according to such rules. It is clear that this ought not to be done. The whole being illegal and

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Haines v. Dubois.

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criminal, we cannot inquire whether Benton lost the money by refusing, under the circumstances, to trot, nor whether Vermont won it, by going over the track without a competitor.

But it is said that the stakeholder was the judge of the race for the parties who staked their money with him, and his decision binding on them. This may be so by the rules of sportsmen, but there is no such legal rule, and we cannot make one for such a case. The evidence overruled does not show that the contract was executed by payment to the winner, and therefore it cannot be considered as executed at all.

Judgment should be affirmed.

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JOSEPH C. HAINES v. DAVID DUBOIS.

1. An endorsement is usually written on the back of a note, but the place is by no means essential. If the payee write his name on any part of a note, with the intention of endorsing it, it is a sufficient endorsement.
2. A notice of protest, drawn and sent to the endorser as maker, instead of as endorser of the note, is sufficient, if such action fully answers all the purposes for which a notice is required to be sent to an endorser.

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On rule to show cause, &c.

The issue in this case was tried at the Salem Circuit, and a verdict rendered for the plaintiff. The defendant seeks to have the verdict set aside, and a new trial granted, because he was not an endorser of the note sued on, and if an endorser he had no sufficient notice of non-payment.

For the plaintiff, *S. A. Allen*.

For the defendant, *J. T. Nixon*.

CHIEF JUSTICE. The only question made upon the argument was, whether Dubois, who was sued as endorser of a note was duly notified of its dishonor.

## Haines v. Dubois.

The note was made by John W. Wright, payable to the order of Dubois, to secure a debt which he owed to one Thomas Newell. He agreed to give security for the delay of eight months, the time the note had to run, and took the note so made away with him, and brought it back with the name of Dubois written under that of Wright, the maker. It did not appear upon the trial that Dubois refused to endorse the note, but was willing to be a joint maker; no evidence was given to show why he did not endorse his name, as usual, on the back, instead of writing it, as he did, on the face. Dubois was sworn upon the trial, and did not pretend that he did not intend to endorse the note. He knew that the note was payable to his order, and could not be negotiated without his endorsement, and with this knowledge put his name upon it. It was a sufficient endorsement.

If the payee write his name on any part of the note with the intention of endorsing it, it is a sufficient endorsement. An endorsement, as the word imports, is usually put upon the back of a note; that is the regular mode, but the place where written is by no means essential. *Partridge v. Davis*, 20 *Vermont* 499—503.

In *Rex v. Biggs*, 3 *P. Wms.* 419—428, it was held, under a statute making it a felony to alter or erase an endorsement on a bill or bank note, that a defendant who had erased with lemon juice a receipt for part payment written on the face of a bank note, was properly convicted under the act for rasing an endorsement.

This is much like the question of how the endorser's name must be written. It has been held that a writing in pencil is sufficient; so an endorsement by initials, and even by figures has been held good. *Brown v. Butchers Bank*, 6 *Hill* 443, and cases there cited. *Merchants Bank v Spicer*, 6 *Wend.* 445. The true rule is stated by Nelson, Ch. Just., in the case cited from 6 *Hill* 443, that a person may become bound by any mark or designation he thinks proper to adopt, provided he uses it as a substitute for his name, and he intends to bind himself. For the same reason, the place where

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Haines v. Dubois.

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the name, or mark, or designation is put is not material, if the signer intended it as an endorsement.

The notary, misled by the place in which he found Dubois' signature, sent notice to him as the maker of the note. This notice Dubois, on the trial, admitted he had received, and did not deny that he was fully apprized by it that the note was duly presented for payment at the Salem Bank, where it was payable, payment demanded of the maker, and refused. A short time before the note became due he called upon the plaintiff, to whom Newell transferred it when made, asked to see it, saw it, and remarked that it was correct.

He was not endorser upon any other note at the time with which this might have been confounded. In short, the case leaves no room for doubt that he was fully apprized by the notice of the dishonor of the note, and by fair implication, that he was looked to for payment. The notice in fact answered all the purposes for which a notice is required to be sent to an endorser. This was held sufficient in *Howland v. Adrain*, decided at June term, 1862. *Ante* 41.

No exception was taken in the defendant's brief to the place where the notice was sent.

The verdict was right upon the evidence, and there should be judgment for the plaintiff.

OGDEN, J. The defendant in this case seeks for a new trial upon two grounds, one that the proofs were not sufficient in law to fix him as the endorser of a promissory note, made payable to his order; the other, that the justice, on the trial of the cause at the Salem Circuit, refused to permit the defendant to prove that, at the time he put his name on the note, at the maker's request, it was agreed between them that the note was to be used to renew, or to raise money to pay off a note in the Cumberland Bank, which he previously had endorsed for the maker, and which would be due in a few days after the note in suit was made, and to read the note payable at the Cumberland Bank and the protest thereof to the jury. It appears, in the state of the case agreed on by



## Haines v. Dubois.

the counsel, that Dubois put his name upon the note at the request of Wright, the maker, on the day it bears date, and that Wright used it in payment of a debt which he owed to one Thomas Newell, of the city of Philadelphia. On the day Newell received the note, he had it cashed by the present plaintiff, and transferred it to him by delivery without recourse. The note is dated April 12th, 1860, payable eight months after date, to the order of David Dubois, at the Salem Bank, for two hundred and twenty-four dollars, without defalcation, for value received, and signed John W. Wright; and it has the name of David Dubois signed immediately under the signature of the maker. A question was made at the trial, whether Dubois became a joint maker or an endorser by placing his name upon the face of the note. It certainly is not usual to transfer the title to a note payable to order by the payee writing his name under that of the maker. The term endorsing conveys a different idea, and implies that the name is written on the back, yet there are respectable authorities showing that the payee's name may be written on the face of the instrument, and it be held in law an endorsement. *Partridge v. Davis*, 20 *Vermont* 499-503; *Gibson v. Powell*, 6 *Miss.* 60; *Rex v. Bigg*, 3 *P. Wms.* 419; *Yarborough v. Bank of England*, 16 *East* 6, 12; 2 *Parsons on Notes and Bills* 17.

The justice correctly instructed the jury that if the defendant was responsible, it was through the legal responsibility of an endorser, and not of a joint maker of the note. The case shows that, on the day the note became payable, it was presented by a notary at the counter of the Salem Bank, and payment duly demanded and refused; and that, on the evening of that day, notices of nonpayment were sent by mail, directed to Centreton post-office, addressed to Haines, the holder of the note, and to Wright and Dubois. The notary did not consider Dubois to be an endorser, and he testified that he sent notice to Wright and to Dubois as drawers. The forms of the notices were not produced or proved on the trial. It does not appear that the notice sent

## Haines v. Dubois.

to Dubois was different in form or substance from that sent to Haines, whom the notary considered as an endorser. It appears, by the testimony of the defendant himself, that he received the notice at the post-office. If the notice was defective; if it was so drawn as to mislead him; if it did not inform him that the note had been duly presented at the bank, and payment refused for want of funds; if the note in question was so defectively described in the notice as to leave him in doubt as to the note referred to in it, he could have satisfied the court and jury upon these points by producing the notice in evidence before them. Having received the notice on which the plaintiff depended for fixing him as an endorser, it was incumbent on him to produce it, if he relied for his defence upon any defect in it. *Burgess v. Vreeland*, 4 Zab. 74.

The justice correctly left it to the jury to say whether they believed, from the testimony, that the notice which the notary mailed for the defendant, and which he admitted he had received properly described the note sued upon, and revealed to him that it was unpaid.

I am satisfied that the justice properly overruled the testimony offered by the defendant, of the oral understanding had between him and Mr. Wright, when the note was signed by him. The note is negotiable on its face: it was payable eight months after date, and was known by the defendant, for some time before it became due, to have been held by the plaintiff for a consideration. The testimony was ruled to be incompetent, unless the defendant would undertake to connect the plaintiff with a knowledge of that equity. He did not allege the fact, or attempt to make any such proof.

The rule to show cause should be discharged, and final judgment entered.

VAN DYKE, J. This action is brought by the plaintiff, as the holder of a promissory note, against the defendant, as the endorser thereof.

It appears, by the evidence, that a person of the name of

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Haines v. Dubois.

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Wright was indebted to a person by the name of Newell, in Philadelphia, for merchandise. In consequence of some deduction having been made from the claim, Wright agreed to give Newell a note for the balance, with the defendant as surety. The note was accordingly drawn up payable at the Salem Bank, with the name of the defendant inserted therein as the payee, and as the person who was to endorse it to the plaintiff. Wright then took the note signed by himself to the defendant, to get his name upon it as endorser. The defendant put his name upon it, but instead of writing it on the back, as is usual, he wrote it upon the face, and immediately under the name of the drawer. This was held by the court to be a sufficient signing of *such* a note to make him liable as an endorser, and as I suppose properly, and no exception is taken to it here.

The defendant offered to prove that at the time when he signed the note it was understood between him and Wright that it was to take up another note in the Cumberland Bank, on which were both their names. But as the defendant made no offer or attempt to prove that the plaintiff had any knowledge of this understanding, the evidence was overruled, and rightly as I suppose, and no question is made about the correctness of such writing in this court.

When the note was returned to Newell, he immediately sold it to the plaintiff, as had been previously arranged between them, for \$200, Newell not endorsing it.

When the note became due it was duly presented at the bank by the notary for payment, and payment refused. The notary then protested the note, and the same evening put the notices of protest in the post-office, directed to Centreton, one for the plaintiff who had endorsed the note, and also for Wright and the defendant. It appears, by the evidence, that Centreton is not the post-office nearest to the residence of the defendant, but that Pittstown is nearer by a mile and a half. But it also appears that while he generally got his mail matters from Pittstown, he sometimes obtained them from Centreton, and that he in fact received the notice in

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Haines v. Dubois.

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question at that office. This is believed to be a sufficient sending of the notice, and the defendant does not now complain of it.

It appears, however, that the notary, in the notice which he sent to the defendant, treated and styled him as a drawer, and not as an endorser of the note; and it is insisted that the notice, for this reason, was insufficient to bind him as an endorser. We have not been favored with a sight of this notice, and do not know what its precise contents were, although, according to the admission of the defendant, in his evidence, he had received it, and must be presumed to have had it in his possession. But as the protest was made by a regular notary, after demand and refusal of payment, and the notice made out by him, and with that notice in the hands of the defendant unproduced for the inspection of the court and jury, and in the absence of all evidence to the contrary, it must be presumed that the notice was sufficient to apprise the party of all that was necessary, and that the jury were authorized in so finding. This would certainly be so, I think, if it had been sent to him as an endorser. Can it make any difference whether he was styled the one thing or the other, or whether he was styled either, if it only contained the information that a particular note, so described as that he could readily recognize it, containing his name, had been presented for payment, and payment refused? This, we are informed by the notary, was a notice of protest of the note in question, which in common, as well as commercial parlance, means a notice that payment of the note had been demanded, and had been refused. This is all that the defendant was entitled to know; and in the absence of all evidence of any imperfection in the notice except that it styled him drawer, and in the absence of all evidence that there was any other note in existence with his name on it which could fall due, and with the notice itself in his possession, unshown to the court and jury, we are bound, I think, to hold that the notice was sufficient.

Judgment for plaintiff.



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State v. Richards.

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THE STATE, THE PAVONIA FERRY CO., PROSECUTORS, v.  
HENRY L. RICHARDS, COLLECTOR OF TAXES.

1. An assessment for taxes, under the charter of Jersey City, on ferry boats and a quantity of coal, alleged to belong to the Pavonia Ferry Company, set aside on testimony showing that the ferry company had no interest in such property.
2. The question, whether the ferry company have power to delegate their right of ferriage, cannot be raised in this case, where the question is, whether the prosecutors are or are not the owners of the property upon which the tax has been assessed.

On *certiorari*. In matter of assessment and taxation.

For the prosecutor, *A. O. Zabriskie*.

For the defendant, *R. D. McClelland*.

The opinion of the court was delivered by

HAINES, J. The writ of *certiorari* in this case brings up the assessment for taxes for the year 1861, assessed on property in Jersey City, alleged to belong to the Pavonia Ferry Company. The objection is to the items in which they are assessed for two ferry boats and a quantity of coal, upon the ground that the same do not belong to, and were never in the use or custody of the prosecutors. The 44th section of the act to incorporate Jersey City, *Laws of 1851*, page 409, provides that the assessors shall assess all real estate and chattels situated in the city, both of residents and non-residents, at its true, full, and fair value, designating the number of lots and parcels of land and the value of the personal chattels which they assess to each person. Hence it is obvious that the property to be assessed must be in the city, and assessed to its owner, whether he reside in the city or elsewhere. If, therefore, the property in question did not at the time of the assessment belong to the prosecutors, the assessment to them for that property must be set aside. And this is a question of fact, to be settled by the testimony. By the

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State v. Richards.

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depositions taken, it appears that the Pavonia Ferry Company have no interest in property at or upon the Long Dock, except the right of ferry, and that it does not, either by itself or its officers, run the ferry nor own any boat nor any coal; that the ferry is run by Nathaniel Marsh, receiver of the New York and Erie Railroad Company; that, as such receiver, he bought the boats for service at the ferry, and has used them in that service, and that the coal in question was also his property, as such receiver, and used in propelling the boats. This testimony is uncontradicted; and if true it shows that the personal property assessed did not belong to the prosecutors, and that they should not have been assessed for it. It is suggested, on the part of the collector, that the ferry company have no power to delegate the right of ferryage. That may be so, or not, but the question cannot be raised here. For if it be held that they have abused their power by letting out their franchise, that does not make them the owner of the boats nor of the coal; and it is of no consequence here who are the owners, nor who ought to have been assessed, if not they.

Some reliance seems to be placed on a letter, written in behalf of the counsel of the Long Dock Company, in which the assessor was informed that the taxes for the improvement on Long Dock had, for that season, better be assessed to the Long Dock Company. But this does not apply to the case before us. It relates to real, and not to personal estate. It could not have misled the assessor, for he assessed real estate to the Pavonia Ferry Company, and they do not object to it, nor call it in question. If it be the same as that mentioned as the real estate of the Long Dock Company, no wrong is done to Jersey City or any of its officers. What the prosecutors complain of is the assessment for personal property, which does not and never did belong to them, and they are entitled to relief.

The assessment, as to the ferry boats and coal, must be set aside.

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State v. Ryerson.

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## THE STATE, URIAH VAN RIPER AND OTHERS, PROSECUTORS, v. JOHN D. RYERSON, ASSESSOR, ETC.

The act of March 27th, 1862, (*Laws* 1862, 307,) is not a supplement to the act of March 14th, 1851, (*Laws* 1851, 270, § 11,) but a distinct and independent act, and does not, in order to raise the necessary money by taxation, require a resolution of two-thirds of the inhabitants present at the meeting of the taxable inhabitants of the district, or the certificate of the school trustees to be under oath.

On *certiorari*. In matter of assessment, to raise money under a special law to pay for building a school house.

This suit is brought to remove a certain certificate, made by the trustees of the Union School District, in the township of Wayne, Passaic county, directing the said assessor to levy and assess the sum of seven hundred dollars on the property and inhabitants of said district, to defray the expense of building a school house.

It is sought to set aside these proceedings, principally on the ground that the question of taxation for such purpose was not submitted to the inhabitants of the district, as required by the school law, and that the order or certificate does not specify what persons and property are to be assessed; and that the special act under which the assessment was made does not, in terms, dispense with those necessary provisions, and should be so construed as to be consistent with the general law.

For the prosecutors, *D. Barkalow*.

For the defendant, *A. O. Zubriskie*.

HAINES, J. Under the act of 14th March, 1851, the inhabitants of the Union School District, in the township of Wayne, and county of Passaic, resolved to raise money to build a school house. The assessment of the money, so re-

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State v. Ryerson.

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solved to be raised, was removed by writ of *certiorari* to this court, and set aside for irregularity. But the trustees had built the house and expended the money, and they applied to the legislature for relief, and procured the passage of the act of March 27th, 1862. This act authorizes the trustees, or any two of them, to assess the cost of the school house on the persons and property of the district, by making a certificate of the amount thereof, with interest on the same to the date of the certificate and delivering the same to the assessor of the township, who is authorized to assess, and the collector of the township to collect the amount in the same manner as other township moneys are or may be assessed, levied, and collected. Under this act, two of the trustees, on the 23d of April, 1862, made their certificate, reciting the act and stating the amount of money expended in building, and the interest thereof, and delivered the same to the assessor, who proceeded to assess the amount of money, certified in the same manner as the other township moneys are assessed. This assessment is brought here by writ of *certiorari* for adjudication, and it is objected, that the trustees are bound to observe the requisites of the act of 1851, except those which, by express terms or necessary implication, are repealed by the act of 1862; and that they have failed so to do, inasmuch as it does not appear that the money was resolved to be raised by two-thirds of the inhabitants present at the meeting, and that the assessment is to be made on the persons and property of the district, without the exception of such property as by the general tax law is exempted from taxation. And further, that the certificate of the trustees is, by the act of 1851, required to be under oath. I can see no validity in any of these objections. The act of 1862 is not a supplement, but a distinct, independent act, providing for the relief of the trustees. The preamble recites the fact of the expenditure of the money in building the school house, and the doubt whether, according to the then existing laws, they had power to raise it by assessment. And then provision is made for the assessment, and the man-



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State v. Ryerson.

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ner is prescribed. All that can be required of the trustees is to follow the directions of the latter act. No preliminary vote of two-thirds of the inhabitants present at the meeting is required. The want of such vote may have been one of the objections under the former writ, and, if so, the defect was intended to be cured by the healing act.

Nor is the certificate of the trustees required to be under oath. The preliminary proceedings had been attempted, and the legislature was satisfied that they were sufficient in substance, and that the money had actually been expended in building the school house, and all that was further required was the certificate without oath of the exact amount expended, and the interest upon it. This was made and delivered to the assessor, and is sufficient authority for him to assess, and for the collector to collect, the amount. The mode of assessing is required by the act to be in the same manner as other township moneys are assessed. Nothing is said about the property exempted, and it may be presumed that the legislature meant to exclude from the assessment property excluded by the general law. If that was not so intended, there can be no question of the power of the legislature to tax for one purpose property which for another purpose is exempted. Besides, there is no evidence, nor even suggestion, that any property of these prosecutors exempted by the general law is included in this assessment, or that the like property of others is excluded from it. If others may have such a ground of complaint, these prosecutors have none.

The assessment must be in all things affirmed.

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Ordinary v. Cooley.

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## THE ORDINARY v. COOLEY AND WEST.

1. One of the conditions of an ordinary administration bond is, that the administrator will pay over to the persons entitled all the residue of the goods and chattels found remaining upon the account of the administrator. *Held*, that it is no breach of this condition that the administrator has or has not paid over to the creditors their *pro rata* share ordered to be paid to them by the Orphans Court, and that the remedy of the creditors is under the other conditions of the bond.
2. The history and origin of the different conditions of the administrator's bond commented upon.

The suit is upon an administration bond, given by the defendants, as administrators of the personal estate of Samuel Cooley, deceased. The declaration sets out the usual conditions of the bond, one of which is as follows: "all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the account of the administration, the same being first examined and allowed by the judges of the Orphans Court of the county, or other competent authority, shall deliver and pay unto such person or persons, respectively, as is, are, or shall by law be entitled to receive the same."

Of this condition the plaintiff assigned the following breach: "and all the rest and residue of the goods and chattels and credits which are found remaining upon the said administration, the same having been allowed by the Prerogative Court of the state of New Jersey according to law, he did not and has not paid the same, or any part thereof, unto the person or persons, respectively, who were and are entitled to receive the same, but hath hitherto neglected and refused, and still does neglect and refuse so to do, contrary to the tenor and effect of the condition of the said writing obligatory, to wit," &c.

To this assignment the defendants pleaded, that as to that breach, "the plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say,

## Ordinary v. Cooley.

there was no residue of the goods, chattels, and credits found remaining upon the allowance of the account of the said John B. Cooley, administrator, &c., of the said Samuel Cooley, deceased, &c., to be paid to any person or persons; but on the contrary, that upon such accounting, and by the decree of said court thereupon, the said estate of the said Samuel Cooley, deceased, was found and deemed to be insolvent, and the said goods, chattels, and credits were insufficient to pay, satisfy, and discharge the debts of the said Samuel Cooley, deceased, and this the defendants are ready to verify," &c.

The plaintiff replied, *precludi non*, &c., "because, he says, there was a large residue of the goods, chattels, and credits found remaining upon the allowance of the said John B. Cooley, administrator, &c., of all and singular the goods, chattels, and credits of the said Samuel Cooley, deceased, of his said administration, &c., to be paid to the person or persons entitled to receive the same; that is, there was found to be remaining in the hands of the said John B. Cooley, administrator, &c., of the residue of the goods, chattels, and credits aforesaid, the sum of four thousand one hundred and eleven dollars and eighty-five cents; and by the decree of the said Prerogative Court, the said John B. Cooley, administrator as aforesaid, was directed to pay to each one of the creditors named in the said account the sum of eighty-three cents and seventy-seven hundredths of a cent to each dollar of said creditor's respective claim out of said residue, which was sufficient to make said payments. And this the plaintiff prays," &c.

To this replication there was a demurrer and joinder.

The case argued by *G. A. Allen* and *M. Beasley*, for the demurrants, and *A. G. Richey*, for the plaintiff.

CHIEF JUSTICE. Upon this demurrer to the plaintiff's replication to the fifth plea filed by the defendants in answer to the fourth breach assigned in the plaintiff's declaration, which is based upon that clause in the administration bond

## Ordinary v. Cooley.

sued upon, which provides that "all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the account of the said administration, the same being first examined and allowed of by the judges of the Orphans Court of the county, or other competent authority, shall deliver and pay unto such person or persons, respectively, as is, are, or shall, by law, be entitled to receive the same." It stands admitted that the estate of the deceased was insolvent, and so found to be by the Prerogative Court, and that the administrator was found, by the decree of the Prerogative Court, to have in his hands, for distribution among the creditors, the sum of four thousand one hundred and eleven dollars and eighty-five cents, and was directed to pay to each of the creditors of the deceased upon their claims, eighty-three cents and seven-hundredths of a cent to the dollar. The demurrer raises the question whether that clause of the condition is for the benefit of creditors, or for the next of kin only, or persons entitled by will to the residue.

The clauses immediately preceding this provide for well and truly administering the estate according to law, and rendering an account of such administration; then follows this clause touching the disposition of the residue.

The term residue means what remains and so found after the account of the administration is rendered.

What remains after the payment of the debts and administration expenses is the residue intended. The account which is to be rendered is the full, final account of the administration of the estate; upon that account the administrator is to produce his vouchers for payments made to creditors before it can be allowed.

The clause obviously contemplates persons who are by law entitled after creditors have been paid. This is too plain to admit of controversy. If this be not so, then there is no clause in the bond securing the rights of the persons entitled to the residue after payment of debts, for the clause was never intended to secure the payment of both creditors and



## Ordinary v. Cooley.

distributees, for their claims are not of the same character; the rights of creditors being paramount to those of the distributees, they are to be paid first. A distribution among creditors and legatees, of a residue of an estate from which nothing had been first taken to leave the residue, is a simple absurdity, as well as a palpable contradiction in terms.

To secure the rights of creditors there is no necessity of resorting to a construction so absurd; they are fully protected by the clause requiring a full and complete administration according to law, and a final account to be allowed by the proper authority.

There must be judgment for the defendants upon the demurrer.

VREDENBURGH, J. This is a suit on an ordinary administration bond, containing the condition prescribed by the statute, *Nix. Dig.* 277, § 11.\* Among the breaches assigned is the following, *viz.* that the administrator has not paid to the persons entitled all the *residue* of the goods, chattels, and credits found remaining upon the account of the administrator, the same being first allowed by the Prerogative Court.

To this breach the defendant pleaded, that there *was* no residue, but that the estate was *insolvent*. To which the plaintiff replied, that there was \$4111.85 residue, which the administrator was directed by the court to pay to the *creditors* of the deceased, at the rate of eighty-three cents to the dollar. To this replication the defendant demurred.

The plaintiff contends, that where an estate is decided to be insolvent under the statute, *Nix. Dig.* 387, § 7,† and the administrator is ordered to pay over to the creditors their *pro rata* share, and the administrator fails to do so, that it is a breach of this condition of the bond. In this he is plainly under a misapprehension. This condition of the bond was provided for no such contingency. The ordinary administration bond, of which this is one, has the following conditions: 1st, that the administrator will make and exhibit

\* *Rev.*, p. 761, § 43. † *Rev.*, p. 772, § 89.

## Ordinary v. Cooley.

an inventory ; 2d, that such goods, chattels, and credits he will well and truly administer according to law ; 3d, that he will make a true account of his administration ; 4th, that all the residue of said goods, chattels, and credits found remaining upon the account, as allowed by the proper court, he will deliver and pay over to the persons entitled.

A slight reference to the history of legislation upon this subject, as well as the language of the bond itself, will show that the two *first* conditions were provided to secure creditors ; the two *last* to secure those entitled to distribution ; and that the persons entitled to distribution cannot aver that the two *first* conditions have been broken, nor the creditors aver that the two *last* have been broken. In very early times, the king, as *parens patriæ*, was entitled to the personal property of intestates. He took possession of them, and, practically, after paying debts, gave two-thirds to the widow and children, and kept the balance himself. This payment of debts, and giving two-thirds to the widow and children, was a matter of grace, and not of legal right. He had the legal right to keep the whole, if he saw fit. But in those early times the influence of the Roman clergy was very great, and continually on the increase. They represented to the king that the souls of intestates were inconveniently delayed in purgatory, for the want of masses said for them, and that it was an unconscientious thing in him to deprive the intestate by distribution thus of his own property, just when he most wanted it, and that the king ought to pass his prerogatives in this regard to them, so that they could appropriate it to that use, and thus the true owner get the value of his property. Partly by such persuasions and partly from fear of the pope, the king finally passed these prerogatives to Roman bishops, who, by virtue thereof, stood in the king's shoes, and so legally entitled to the whole personal estate of intestates ; and this is the origin of the Ecclesiastical courts of England and the Prerogative and Orphans courts in this state. The Roman clergy, being thus under no legal obligation to pay debts, or to distribute any part of the estate to the next of

## Ordinary v. Cooley.

kin, felt bound in conscience strictly to execute the trust. The widow and children easily acquiesced in this arrangement, but the creditors were always somewhat reluctant; and accordingly we find that the barons at Runnymede procured an insertion in *magna charta* that the bishops should pay the debts and distribute. But the Roman clergy had influence enough to avoid its execution, so that this provision of the great charter fell obsolete. Not only so, but afterward, in the great charter of Henry the third, they had influence enough to cause the whole subject matter to be ignored. Things remained in this condition, the bishops having the legal right to all the personal property of intestates, and without either paying debts or accounting to the next of kin, until the 13th year of the reign of Edward the 1st, when it was enacted, that the Ordinary should be bound to pay the debts of the intestates as far as his goods extended. But the Ordinary yet gave no security whatever, and all the residuum, after the payment of debts, still remained in his hands to be disposed of for pious uses. Thus it continued until the 37th year of the reign of Edward the third, when parliament, in consequence of the flagrant abuses practised, enacted that "in case where a death of an intestate occurs, the Ordinary shall depute of the next and most lawful friends of the dead person to administer his goods, which persons deputed shall have action to demand and recover, as executors, the debts of said intestate, to administer and dispense for the soul of the dead, and shall answer also in the king's courts to others to whom the said deceased was holden and bound." It will be observed that this statute merely took from the Ordinaries the power to administer, and compelled them to grant the administration to the next and most lawful friends of the intestate, and all the administrator had to do, was to pay the debts. He gave no bond of security, and he retained all the residuum, after the payment of debts, as his own property.

There was yet no such thing as distribution amongst the next of kin, or security given by the administrator, either to

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Ordinary v. Cooley.

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pay debts or to distribute. As soon as the debts were paid the estate was administered, and there was nothing further to be done by the administrator. All the rest of the estate belonged to himself to *dispense*, in the language of the statute, for the soul of the dead.

The administration by this statute, it will be observed, was granted to the next and most lawful friends of the intestate. This language was afterwards altered by the statute of 21st Henry the 8th, and the Ordinary compelled to grant the administration to the widow or the next of kin of the intestate, and which is the same as our own statute now in force. It will be perceived that as yet no change is made in the rights of the administrator. There is yet no statute of distribution; the administrator takes all after the payment of debts. But this statute of 21st Henry the 8th introduces one great change. It requires, for the first time in the history of administrations, that the Ordinary shall take surety from the administrator, not to distribute, but only to pay debts. It could not have been, surely, that the administrator shall settle in the Prerogative Court, and pay the surplus after the payment of debts to the next of kin, for the surplus yet belonged to the administrator himself, to do with it as he pleased; and, moreover, there was as yet no statute of distribution. But the only surety that could be required was that the administrator would make and exhibit an inventory, and pay the debts, or, as it was then technically called, administer the estate. So that, by the statute of 21st Henry the 8th, the bond given by the administrator contained two conditions; one was the exhibiting an inventory, the other was to pay the debts. These, it will be observed, are the two first conditions in the bond now required by our statute, and which we have above specified. But these two first conditions were provided in the interest of creditors, and not in the interest of the next of kin, because there were yet no next of kin that could take or had an interest in the estate. Things remained in this condition until the 22d of Charles the 2d,



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Ordinary v. Cooley.

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over a hundred years, when the first English statute of distributions was passed.

This statute provided that the Ordinary should call administrators to account, and order a just and equal distribution (after debts and funeral expenses were paid) among the wife and children and next of kin, substantially as our statute does now. And it provided, in the second place, that the Ordinary should require of the administrator a bond with security, and with the same conditions as our statutes now provide, *viz.* 1st, to file an inventory; 2d, to well and truly administer the estate, or, in other words, pay the debts; 3d, account in the Prerogative Court; and 4th, pay the surplus found upon such accounting, to the next of kin.

Hence it is manifest, that these two last conditions in the bond were required to compel the administrator to perform the two additional duties imposed upon him by this last statute of 22d Charles the 2d, *viz.* 1st, to account in the Prerogative Court; 2d, to pay over the surplus found upon such accounting to the next of kin.

This is further manifested from another historical fact. After the said statute of Edward the 3d took away from the Roman bishops the power to administer themselves, and forced them to grant administration to the next of kin, like other people, they were very prompt to force others to be honest, as soon as they had no temptation to be otherwise themselves, and they attempted to force the administrator to give security to distribute to the next of kin; but they were restrained by the courts of common law by prohibitions, upon the ground that the statute of Edward the 3d meant to give to the administrator appointed by the Ordinary the same rights of property that the Ordinary himself had before that statute was passed, and that consequently the administrator was not obliged to account or distribute, and that his only duty was to pay the debts, and that he might do with the surplus what he pleased; and no bond ever was or ever could be required of the administrator to account or distribute, until those additional duties were expressly imposed upon

## Ordinary v. Cooley.

him by the said statute of 22d Charles the 2d. This statute was passed in the year 1661, and was among the very first of our colonial statutes, and has to this day remained unaltered upon our statute book.

So that, by this short historical resumé, it appears that originally the administrator neither paid debts nor distributed. After some hundreds of years, he was first made to pay debts ; after some more hundreds of years, he was next made to give security to pay debts ; after over a hundred years more, he was made to distribute the surplus, after paying debts, and to insert in his bond the additional condition, that he should distribute. So that it would appear, that these conditions of our administration bonds of the present day, were the growth of many centuries of English legislation, each additional condition being added as each additional duty was imposed by statute upon the administrator. Thus we see how each stone was laid in the edifice, and came to have its peculiar form and color. The very antiqueness of the language of these conditions gives evidence of their origin, and their natural import is in accord with their history.

The declaration does not show whether this suit is prosecuted at the instance of creditors or of distributees. If by distributees, the plea is a good defence to the breach assigned ; if by creditors, there is no breach at all. But the replication does show on its face that it is not by distributees ; and creditors cannot complain that the distributees are not paid. The creditors can only complain of a breach of the conditions in the bond provided for their security, which conditions are—1st to file an inventory ; and 2d, to administer the estate. If the administrator does not pay the creditors he does not administer the estate, and breaks that condition of the bond, and not the condition under which he is compelled to distribute, and under which this breach is assigned. The defendant is entitled to judgment on the demurrer.

Judgment for defendant.

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Flemming v. Clerk of Hudson County.

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## JAMES FLEMMING, JUN., v. THE CLERK OF THE COUNTY OF HUDSON.

Under the act respecting conveyances (*Nix. Dig.* 131, § 9,) and the act respecting mortgages, (*Nix. Dig.* 550, § 1,) the clerks of the Courts of Common Pleas are entitled to charge all persons making searches the "fees allowed by law." The fees are allowed for searches as well as for transcripts.

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The plaintiff applied to the court for a rule to show cause why a *mandamus* should not issue against defendant, as clerk of the Court of Common Pleas of Hudson county, requiring him to allow the applicant, as one of the attorneys of the court, to make searches in the books of record in his office without the payment of fees.

The motion was argued by the applicant *pro se*.

The opinion of the court was delivered by

HAINES, J. A motion is made on behalf of James Fleming, one of the practising attorneys of this court, for a rule to show cause why a writ of *mandamus* shall not issue to the clerk of the courts and county of Hudson, commanding him to allow to the applicant, the temporary use of the books of judgments of the said court, and of the indexes of the same, for the purpose of making search for judgments against a person named, without payment of any fees. A demand in writing, of permission to use the book, was made upon the clerk, and refused by him, unless the fees were paid.

This presents a question as to the duties and immunities of the clerk in relation to the public records; a question of general interest, affecting the clerks of the several counties, and of the state courts as well.

The question affects, also, the rights of the public, of persons for whose benefit and protection the records are made, and of those whose business or interest it is to know their contents. Before a rule will be granted to show cause why the summary prerogative writ of *mandamus* should not issue, the

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Flemming v. Clerk of Hudson County.

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court should be satisfied that there is a *prima facie* case of neglect or abuse on the part of the clerk, and that there is no other mode of adequate redress. Is such a *prima facie* case made here?

Offices are defined to be the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging; and among the rights of things, are classed with incorporeal hereditaments.

Their existence, says Sir William Blackstone, is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses.

The abstractive in this case does not demand our attention; it is the effects and profits, the duties and perquisites, with which we are to deal.

The duty of the clerk, enjoined by statute, is to make and preserve the appropriate records of his office; of the clerk of the county, upon the final determination of any civil cause, to make a complete record of the declaration, pleadings, proceedings, and judgments in such case in a separate book to be kept for the purpose, with a complete alphabetical index to the same. *Nix. Dig.* 660, § 77.\*

By the 9th section of the act respecting conveyances, (*Nix. Dig.* 131, § 9),† he is required to record, in large well bound books of good paper, to be provided for the purpose, and carefully preserved, all deeds and conveyances of lands lying within his county, properly certified to have been proved or acknowledged, which shall be delivered to him to be recorded.

He is bound not only to *make* these records, but to *preserve* them, and at the expiration of his term of office, to *deliver* them to his successor. To secure the performance of these duties, he is required to be solemnly sworn, and to enter into bond with sureties in the penalty of five thousand dollars.

The preservation of these records includes not only the keeping of the books in safe custody, but their security against alteration or mutilation. To steal, embezzle, alter,

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\* *Rev.*, p. 409, § 3. † *Rev.*, p. 157, § 25.



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Flemming v. Clerk of Hudson County.

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or falsify any record, writ, minute, document, or other proceeding belonging to any of the courts of this state, or to the office of the secretary of state, or to any office of any clerk of the courts of this state, is a high crime, punishable by fine and imprisonment.

Thus it is seen of how much importance are considered the public records, in which so many rights of persons and of property are involved, and what precautions have been taken against their loss or mutilation.

This high trust is committed to the clerk, and he is held responsible for its fulfillment by the obligation of his oath, by the penalty of his official bond, by his liability to a civil action for a penalty fixed by the statute, and for damages to a party injured, and also to being removed from his office. 1 *Keble* 597.\*

For these services the statute has provided compensation for the filing of papers and making the records, and by fees for making searches, and when required, for certificate and seal. These fees are fixed by statute, and are intended to be fair and reasonable compensation for the labor and responsibility of the office. These perquisites pertain to the office, and belong to the clerk as the products of the abstract incorporeal hereditaments. He is as much entitled to fees for searching as for making the records.

But it is insisted that, under the act concerning conveyances, the attorneys of the court have the right to make the searches themselves, independently of the clerk, and without payment of fees. The 9th section of the act, which provides for making the records of deeds in proper books, has the provision, that to those books every person shall have free access at proper seasons, and be entitled to transcripts of the same on paying the fees allowed by law; and the act of 15th April, 1846, concerning mortgages (*Nix. Dig.* 550),† provides that every person may have access to the books at proper seasons, and may search the same, paying the fees allowed by law. There is no such provision concerning the records of judgments; the act of March 9th, 1845, (*Nix. Dig.*

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\* *Town of Wigan v. Pilkington.* † *Rev.*, p. 705, § 17.

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Flemming v. Clerk of Hudson County.

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406)\* relates to the docketing of judgments of the Circuit Court into the Supreme Court.

These clauses, beyond question, authorize the free access, at proper seasons, to the records of deeds and mortgages, not only of the attorneys of the court but of all persons. The expression is, "to which books *every person* shall have access." No distinction of persons is made. But there is a condition annexed, "on paying the fees allowed by law."

The fees allowed are for searches as well as for transcripts. The true construction of the clause is, that every person may have access to the records; but through the agency or under the supervision of the clerk, and with his assistance, and on the payment of the lawful fees. If the clerk chooses to take the responsibility of allowing the attorneys of the court, or any other person, to make searches and abstracts, he may do so; but upon such terms, within the limits of the fee bill, as they may agree upon.

It was never intended to hold the clerk responsible for the preservation of the books and files of the court, and to hold him by so many checks and ties, and yet open the office for the search of the books, the handling of the papers by any one who may demand it. Every one, is a very comprehensive expression. If the clerk must admit one, he has no right to exclude any; and who, in such case, would be willing to vouch for the books and papers? Who would be willing to swear, and to bind himself and sureties in a penalty to deliver them to his successor?

There is neither authority of law, nor justice, nor propriety, nor safety to individuals, nor to the public, in so opening the doors of the office, and so exposing these valuable public records. The clerks now officiating did not take their offices subject to such a burthen, and it should not now be imposed upon them. Should the legislature think proper to alter the law upon the subject, they will, as a matter of common justice, relieve the clerks from the responsibility of preserving the files and records, or make the act prospective. They will not hold him to so great a responsibility, and deprive him of so much of his compensation.

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\*Rev., p. 521, § 7.

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Taylor v. Sip.

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The duties and perquisites should be reciprocal, and as far as may be, equivalent. They cannot be so, if the office is open to such use of every one, without payment of the lawful fees.

The rule to show cause must be denied.

ELMER, J., concurred.

VAN DYKE, J., dissented.

OVERRULED in *Lum v. McCarty*, 10 *Vroom* 288.

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TAYLOR AND THOMSON v. TUNIS SIP.

1. The general rule is, that the holder of a check is bound to present it for payment in a reasonable time, and if not paid, to give notice thereof to the drawer in a like reasonable time. What is reasonable time will depend upon circumstances.
  2. What considered reasonable time in the case of a check post dated, and deposited for collection upon the day of its date.
  3. A check post dated must be considered as issued the day it bears date.  
—*Per* WHELPLEY, Ch. Just.
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The action is brought on a check on the Cataract City Bank, drawn in Paterson by Tunis Sip, to the order of the plaintiffs, for \$341.95. It was for merchandise bought on the 24th October, 1860, and was given on that day, but post dated 24th of November following. The check not being paid by the bank, plaintiffs brought this suit to recover the amount. On the trial at the Morris Circuit before the Chief Justice, a verdict was taken for the plaintiffs, subject to the opinion of the court at bar, on the following case:

This action was brought upon a check, *pro ut* the same, and came on to be tried before the Chief Justice at the Morris Circuit, January 22d, 1861, before a jury, when the plaintiffs proved the execution of the check by the defendant,

## Taylor v. Sip.

and the endorsements thereon, that the same was deposited in the Hackettstown Bank a few days before it is dated, and discounted by the bank for plaintiffs, having been drawn on the 24th October, 1860, at Paterson, and delivered to the plaintiffs there in payment for goods sold and delivered, and post dated on the 24th November, 1860; that on the evening of the 24th November, the Hackettstown Bank, by its cashier, placed the same in a package with twelve other checks, and enclosed them in a letter, dated the 26th November, and the same day (26th November) placed the said letter containing those checks in the post-office at Hackettstown, Saturday, the 24th, or Monday, the 26th, directed to the Newark Banking Company, Newark; that the said package was received by the cashier of said last named bank, for the first time, in the said Newark Banking Company's office during business hours of the 27th, and receipt thereof acknowledged on that day, and forwarded to the Mechanics and Traders Bank in Jersey City on the 28th, and that on the morning of the 1st December, the president of the Cataract City Bank found the said check in his bank in the morning, at the opening of the bank, in the Mechanics and Traders Bank packages received by mail, and during the day, about three o'clock, handed the same to a notary to present for payment; that the same was presented, by said notary, to the president at said Cataract City Bank for payment, payment required, and the check protested for non-payment, and due notice thereof given; that the Cataract City Bank kept an account with the Mechanics and Traders Bank of Jersey City, and settled twice a week, on Tuesdays and Fridays; that the said Cataract City Bank paid all checks presented at its counter on the 1st December, but none sent from other banks by mail; that the said check was sent from the Hackettstown Bank to the Cataract City Bank through the ordinary channels used for the collection of such papers; that the Cataract City Bank did not credit the Mechanics and Traders Bank at Jersey City with the said check in the ordinary course of business, because its officers then believed that



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Taylor v. Sip.

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unless their bank received aid that day, it would be compelled to stop.

Thursday, the 29th November, was thanksgiving day.

The sale and delivery of the goods mentioned in the bill of particulars admitted by defendant.

It was proved that the check would have been paid if presented at any time prior to the 1st December, on or after 24th November.

There was a morning and evening mail from Hackettstown to Newark, closing at six and a half A. M. and one and a half P. M.

A morning and evening mail from Newark to Jersey City, and the same from Jersey City to Paterson.

The Cataract City Bank did no business after the 1st December, and went into the hands of receivers.

The defendant's account was good to pay the check from the 24th November to the 1st December, inclusive.

The check was given in pursuance of an arrangement which existed between the parties, that defendant should have thirty days' credit on goods sold by plaintiffs to him, and should give his check to them, post dated thirty days as in the present instance.

Plaintiffs and defendant believed the Cataract City Bank to be in good credit until after the 1st December, and had no reason to believe otherwise.

JACOB VANATTA, *Att'y of Plaintiffs.*

JOHN HOPPER, *Att'y of Defendants.*

On the coming in of the *postea*, it was moved that judgment be entered on the verdict.

For the plaintiffs, *J. Vanatta.*

1. This is an action between the original parties to the check.

The plaintiffs lived and did business at Washington, Warren county.

## Taylor v. Sip.

The defendant resided, and did business in the city of Paterson.

The check was made and issued nearly thirty days *before its date*.

2. Although post dated, it is to be treated as if issued on the day it bears date. *Story on P. Notes*, § 490, and *notes*; *Mohawk Bank v. Broderick*, 10 *Wend.* 304.

3. Checks are to be treated and regulated as inland bills of exchange. *Per KENT*, Judge, in *Cruger v. Armstrong*, 3 *Johns. Cases* 5; *Smith v. Jones*, 20 *Wend.* 192.

4. To charge *the drawer*, the general rule is, that the holder, in case of dishonor, is bound to present the same for payment within *a reasonable time*. *Chitty on Bills* 380; *Conroy v. Warner*, 3 *Johns. Cases* 259.

5. What is "*a reasonable time*," is a question of law, and is dependent upon the circumstances of each case. 3 *Johns. Cases* 259; *Chitty on Bills* 280; *Ibid.* 285, *note* 1; *Ibid.* 513, and *note* 2; *Story on Bills*, § 470, 473, 475.

Here, treating the check as issued on the day it bears date, and as then delivered to the plaintiffs at their place of business, the ordinary means of collection were employed, and hence due diligence was exercised.

For the defendant, *J. Hopper*.

CHIEF JUSTICE. At the circuit the plaintiffs had a verdict for the amount of the check sued upon, subject to the opinion of the court upon a case stated, agreed upon by the parties.

The point presented for decision is, whether the check was presented for payment at the bank upon which it was drawn in due time, so as to exonerate the holder from *laches*, and throw the loss occasioned by the failure of the bank before presentation upon the drawer. The plaintiffs resided and did business at Hackettstown, in Warren county, and sold the goods, for which the check was intended to pay, to the defendant at Paterson, he residing and doing business

## Taylor v. Sip.

there, and the drawer being cognizant of that fact. The check was given at the time the goods were sold, upon the 24th October, at Paterson, in pursuance of an arrangement between the parties, that defendant should have thirty days' credit on goods sold by plaintiffs to him, and should give his check to the plaintiffs post dated thirty days, as in the present instance. The check bore date on the 24th November, and came to the Cataract City Bank upon the 18th December, upon which day the bank failed, refusing to pay all checks received by mail, although it paid on that day all checks presented at its counter. The next day it stopped payment on all demands, and has since been insolvent.

Although the plaintiffs received the check on the 24th October, they did not put it in circulation, or in course of transmission for presentation until a few days of the 24th November, when they had it discounted at the Hackettstown Bank. On the evening of the 24th November, the cashier of the bank enclosed it, with other checks, in a letter directed to the Newark Banking Company, and put the letter in the office on Saturday, the 24th, or Monday, the 26th. It was received by the Newark Bank, in business hours, on the 27th, sent by that bank to the Mechanics and Traders Bank, in Jersey City, on the 28th. On the morning of the 1st December, it was found in the Cataract City Bank, in the package received from the Mechanics and Traders Bank. The 29th November was thanksgiving day, appointed by the governor.

This was the usual route by which checks on Paterson, put in the Hackettstown Bank, were collected.

A check is an instrument *sui generis*, in some respects resembling, and in others differing from an inland bill of exchange.

Ordinarily the drawer of a check is the principal debtor, and the presumption is that it was drawn to pay a debt due by the drawer upon a bank or cashier having the funds of the drawer upon deposit subject to be appropriated to the use of the drawer. The drawing of a check is considered an

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Taylor v. Sip.

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appropriation of so much of the drawer's funds to its payment. By it, the drawer is under obligation to leave so much of his funds in the drawer's hands, to await the presentation of the check; and if he does so, and there is unreasonable delay in the presentation of the check, and the drawer suffers loss in consequence thereof, as by the failure of the drawee before presentation, the loss will fall upon the holder of the check, if it would have been paid if presented in due time. No days of grace are allowed upon it. It is payable as soon as drawn, unless payable at a future day by its terms or post dated. It is not presentable for acceptance, but for immediate payment. When post dated, it is not presentable for payment until the day of its date. When payable at a future day, it is payable on that day or after. The drawer is not discharged for failure to present it when due, unless he has sustained damage, and then only *pro tanto*; but he cannot be called upon to pay it, until after demand of payment had been made upon the drawer, and payment refused, and notice given to him of nonpayment, unless a sufficient excuse be shown for not doing it. This previous presentment to the drawee, and demand of payment and notice of nonpayment to the drawer, is not for the purpose of fixing the drawer, as in case of the drawer of a bill, or endorser of a note, but as a prerequisite to the bringing of an action. The payee having accepted the check as payment, is thereby under obligation to call upon the drawee and demand payment, and give the drawer notice of dishonor before he can sue him.

The payee of a check, in order to avoid responsibility for the failure of the drawee, if he resides in the same place where the drawee and drawer reside, and receives it there, should present it for payment upon the next day after he received it within business hours, if payable when he received it, unless the circumstances under which it was issued and the purpose for which the drawer drew it, and knew it was to be used, show that it was not intended to be so presented.



## Taylor v. Sip.

The general rule is, that the holder is bound to present it for payment in a reasonable time, and to give notice thereof to the drawer, in a like reasonable time. What is a reasonable time will depend upon circumstances, and will in many cases depend upon the time, the mode, and the place of receiving the check, and upon the relation of the parties between whom the question arises. If the check is drawn for the purpose of being negotiated at a distant place, that circumstance is also to be considered, and it is to be presented as promptly as the purpose for which it was issued will permit, having regard to the usual course of business and banking, in transmitting such checks to their place of payment. These rules will be found to be fully sustained by the cases and approved text writers. *Story on Prom. Notes, title Check; Parsons on Notes and Bills, tit. Check; Ed. on Bills and Notes* 398, 397; *Chitty on Bills* 546; *In re Brown*, 2 *Story* 502.

Where a check is issued for the benefit of the payee, by the drawer, and post dated to the time when the drawer's debt becomes due, to enable the payee to use it in a distant place from that where it is payable, it is to be considered, for the purposes of presentment, as if issued on the day it bears date, and is payable at sight on or after the day it bears date. *Mohawk Bank v. Broderick*, 10 *Wend.* 304; 13 *Wend.* 134, *S. C. in Error*.

The check was in the hands of the Hackettstown Bank on the day of its date, the 24th December, which had received it before that time, and discounted it for the use of the plaintiffs. Story, in his work on *Notes*, § 493, lays down the rule as to presentment of a check drawn at a place distant from its place of payment, as follows: The holder is bound to forward it by post to some person at the latter place on the next secular day after it is received; and the person to whom it is forwarded will not be bound to present it for payment, until the day after it has reached him by course of post.

*Parsons on Notes and Bills*, § 73, says: Where the drawer, drawee, and payee of a check live in the same place, the payee

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Taylor v. Sip.

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has still a day for his presentment; but if it is drawn on a distant place, it has been held, in England, that the payee has until the next secular day to forward it, and his agent has till the day of the receiving it for presentment and demand. For this he cites *Smith v. Janes*, 20 *Wend.* 192; *Moule v. Brown*, 4 *Bing. N. C.* 266; *Rickford v. Ridge*, 2 *Campb.* 537.

Nor need the check be sent direct to its place of payment by the holder. It may be sent by the usual and accustomed channel of transmission. If it belong to a bank, or be left with it for collection, and the bank does not exchange directly with the bank upon which it is drawn, it may be sent to a bank with which it does exchange, and so to its correspondent bank, until it reaches the bank at which it is payable, if the route be not unreasonably circuitous. Such is the well settled usage among banks, and it is sanctioned by law. Such is the rule in regard to the transmission of bills of exchange, and it seems equally applicable to checks. Any other rule would be exceedingly onerous to the holders of checks. *Wallace v. Agry et al.*, 4 *Mason* 336; *S. C.*, 5 *Ibid.* 118; *Smith v. Janes*, 20 *Wend.* 193.

The check was dated the 24th November. The 25th was Saturday. It was transmitted on the 26th by the mail of that day, which left at one and a half o'clock P. M., received by the Newark Banking Company on the 27th November, sent by it to the Mechanics and Traders Bank on the 28th, and would, in due course of mail, be received on the 29th, but that was thanksgiving day. That bank had until the 30th to transmit it to the Cataract City Bank. It was received there on the 1st December, as it was found in the bank on the morning of that day. The case expressly states that the check was sent by the ordinary channel used for the collection of such paper.

As the check was to be considered as if issued on the day it bore date, and as it was transmitted by the usual channel for collection, in strict accordance with the rule giving a day to each collecting agent, I think the holder of the check was

## Taylor v. Sip.

not guilty of negligence, and that the drawer of the check, the same having been duly presented for payment, and due notice of non-payment given to him, is liable for the amount of the check, and that there should be judgment on the verdict.

OGDEN, J. The action is founded on a check, drawn by the defendant in favor of the order of the plaintiffs, for \$341.95, in Paterson, on the 24th of October, 1860, given in payment of merchandise purchased on that day, but post dated on the 24th of November following. It was payable at the Cataract City Bank at Paterson. The plaintiffs resided in Washington, Warren county. The defendant, a resident in Paterson, provided funds in the Cataract City Bank to meet the check before the 24th of November, and had them on deposit for that purpose when the bank failed, on the first of December. The check did not reach the bank until the 1st of December, when payment was demanded and refused, and due notice of dishonor given to the defendant. The Cataract City Bank shortly afterwards went into the hands of a receiver, and the depositors have sustained total loss. The question presented to this court is, whether the payees or their endorsee used such a degree of diligence in presenting the check for payment as entitles them to recover the money from the maker. The check bears date, and was payable, on Saturday, the 24th of November, but it was not presented at the bank for payment until Saturday, December 1st.

What is due diligence in presenting a post dated check for payment? It was conceded, on the argument, that checks post dated are not entitled to days of grace. Although this check was payable on the day of its date, and if payment had been refused by the bank on that day it would have been lawfully protested, yet the holders were not bound to make the demand on that day, mercantile usage having given them at least the next business day to present it at the counter for payment. *Brown's case*, 2 Story 502.

The question raised in this case is, what length of time the

Taylor v. Sip.

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holders had to forward the check to the bank on which drawn, so as to hold the maker on non-payment? It is impossible to lay down an inflexible rule which should govern all cases of checks. Justice Marcy said, in the case of the *Merchants Bank v. Spicer*, 6 Wend. 445, that checks are considered as having the character of inland bills of exchange, and the holder thereof, if he would preserve his right to resort to the drawer or endorsers, must use the same diligence in presenting them for payment, and giving notice of default of the drawee, that would be required of him as the holder of an inland bill. I think that this is stricter law than is required for the decision of this case; because an inland bill must be presented for payment on the day it becomes payable. What shall be deemed a reasonable time, must in some measure depend on the circumstances of each particular case. The court say, in *Murray v. Judith*, 6 Cowen 490, "as a general rule, a check is not due from the drawer until payment has been demanded from the drawee, and refused by him. As between the holder and an endorser, payment must be demanded within a reasonable time; but as between the holder and the maker a demand at any time before suit is sufficient, unless it appears that the drawee has failed, or the drawer, in some other manner, has sustained injury by the delay." Chancellor Kent held, "If the drawer of a check suffers by the delay, as by intermediate failure of the drawee, he may complain of delay unreasonably protracted. If the holder unreasonably delays, he assumes the risk of the drawee's failure, and may, under the circumstances, be deemed to have made the check his own, to the discharge of the drawer. What then is unreasonable delay?" If a person in Detroit should to-day make a check upon a bank in the city of New York, it would not be required of the payee, in order to hold the maker, that he should have the check presented for payment until it could be forwarded and received in the city by due course of mails; and if the bank failed during that interval of time, and payment should on that account be refused, the drawer would be liable to pay the money, because no ordinary



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Taylor v. Sip.

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diligence would have procured an earlier demand. The distance from Hackettstown to Jersey City is about fifty miles, and the case shows that two mails passed daily between those places. The distance from Jersey City to Paterson is about seventeen miles, and it appeared that two mails were made up and sent daily between those places. The plaintiffs became possessed of the check thirty-one days before the day of its date, and the Hackettstown Bank passed the net proceeds of the discount of it to the credit of the plaintiffs several days before the check was payable, and no satisfactory reason has been shown why payment was not demanded at an earlier day. The counsel of the plaintiffs insisted, that the bank employed their usual mode of forwarding their receivables to the eastern part of the state through their correspondents in Newark, and hence that no *laches* is imputable to them for not having the check at the counter of the bank in Paterson at an earlier day. I do not think that the drawer of the check is answerable for the consequences of delay, resulting from the mode which the Hackettstown Bank chose to adopt for collecting checks on other banks. If a week was required for transmitting a check to Paterson, the bank should have forwarded it to Newark before it was payable, so that it could have reached the drawee within a reasonable time. I know of no mercantile rule which required them to hold it in their office until it became payable. If it had a legal existence for discount before the date, it had the same existence for transmission for collection. It was sent from Hackettstown, on Monday, 26th, by a mail which would have carried it to Paterson by Tuesday afternoon, but it did not reach the bank until the following Saturday. It is true that Thursday was a public holiday, but the mails were carried regularly on that day, and there was no public necessity that the check should be held *in transitu* for twenty-four hours in an intermediate bank, to the loss and damage of the defendant to the amount of the check, if he should be held liable in this action. The check would have been paid by the bank if it had been presented on or after the 24th of

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Taylor v. Sip.

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November, and before Saturday, the 1st of December. Delay in presenting a check for payment will not authorize the maker to withdraw from the bank, or otherwise appropriate the funds which the fact of drawing the check assumes that he has devoted for its payment. If a check is not paid in many days or weeks after it bears date, a loss of interest by the holder is all the damage which can result to any person from an unreasonable delay in procuring payment. But if a loss is to be sustained from the failure of the drawee, while the funds are on deposit, and some time after a check was payable, some party connected with it must sustain the damage. The question then arises, upon whom shall the loss fall, the party who fulfilled his contract by providing the funds at the place designated in the check, and appropriated them to the payment of it, or the party who failed to call for his money within a reasonable time after it became due?

The delay was attempted to be excused under the rule which has been established for regulating the transmission of notices of protest from one endorser of a dishonored note or bill to another. That rule allows to each one day for advising a prior endorser.

But I do not see such analogy between the cases as can sanction the delay which attended the presentment of the check in suit for payment. The right of the drawer of a check to be absolved from liability, when a loss occurs from the subsequent insolvency of the bank drawn upon, should not be made to depend upon the mode which the holder of it may adopt for obtaining his money at the counter. In all cases, a check should be presented for payment within a reasonable time. In the case of the *Mohawk Bank v. Broderick*, first reported in 10 and afterwards in 13 *Wendell*, the endorsers of a post dated check were prosecuted. A special verdict showed that the maker of the check had no funds in the bank at Albany, on which it was drawn, on the day of the date of the check, or any time afterwards; that on the day of the date the check was deposited in the

## Taylor v. Sip.

Mohawk Bank, and entered as cash to the credit of the depositors; that the bank did not send it forward until twenty days had expired, because they made exchanges with the bank in Albany only once in three weeks, and that during the time the drawer had failed. Although he had not provided funds in the bank to meet the check, yet as he had failed, and an earlier demand might have saved the loss of the amount of the check, the Court of Errors in New York unanimously decided, that the holders of the check were chargeable with gross negligence in presenting the check for payment. In the present case the circumstances show that the loss resulted from the delay which occurred in forwarding the check, and that the holders did not exercise reasonable diligence in seeking to obtain payment from the bank.

VAN DYKE, J. The plaintiffs sue the defendant on a check, given by him to them for \$341.95, on the Cataract Bank at Paterson. The check was in fact drawn and delivered to the plaintiffs on the 24th day of October, 1860, thirty-one days later. It was presentable for payment at the bank on the day of its date, and not before. On the day when the check was so presentable, the defendant, as the drawee, had the money in the bank to pay it, and continued to keep it there for six days thereafter, but the check was not presented at the bank until the seventh day after its date, on which day the bank failed. The check was not paid, and the money was lost. Now here was great negligence somewhere, and the party who has been guilty of it should be the loser. It could not have been the defendant, for he met every obligation which rested upon him. He had his money at the bank on the day the check was first presentable for payment, and continued it there for several days thereafter; and the evidence is that it would have been paid, if presented, on any day between the 23d of November and the 1st of December following.

If the check had been drawn at a far distant point, and

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Taylor v. Sip.

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had been dated and made presentable on the day on which it was drawn, the necessary and usual time for its transmission to the place of payment would have been allowed; but that rule has no application at all here, for in this case the check was actually drawn and delivered at Paterson, within call of the bank where it was made payable; and there is no reason whatever, except the mere will of the holders, why it might not have been deposited in the bank on that same day for payment when it came due. And then, besides this, the plaintiffs had thirty days longer within which to carry or send this check to the bank for payment; and when, at the end of six days later, they still had not the check at the bank for payment, and by means of which the money deposited to pay it became lost, it seems impossible to avoid the conclusion that the negligence and want of due diligence were gross, and that they were wholly on the part of the plaintiffs.

It is a matter of no importance where the check was between the time when it was drawn and the time when it reached the bank, as no reason is furnished why it might not have been presented in due time. Neither the plaintiffs, nor any other person in whose hands they may have placed the check, had any justification for retaining it until it was too late for it to reach its destination in due time, and then set up that they had used the ordinary channels of transmission. The agents employed were the agents of the plaintiffs, and their failures in duty were the failures of the plaintiffs.

The check seems to have been placed in the Hackettstown Bank a few days before its date, and was there discounted; but this can make no difference to the defendant. If the default was theirs, it may be that the plaintiffs were not bound to take it up; but they seem to have done so, and now claim it as their own, and have brought their action upon it; and they must in this suit bear the responsibility of all the delinquencies that have occurred.

The ordinary rules of commercial and mercantile law which



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Taylor v. Sip.

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apply to commercial paper, are not applicable to this case. If the defendant had withdrawn his money from the bank on the second or third day after the check was payable, and had then denied his liability upon it on the ground that it had not been presented in due time, the question would have been determined by their rules; but when the drawer of a check in good faith and in due time, places his money in the bank for the purpose of its payment, and does not withdraw it all, but keeps it there for a week, that the holder may call or send and get it, and on his failure to do so, the money, in consequence, is lost by the failure of the bank, the question must be determined by the ordinary rules of law and justice. These, I think, require that this defendant should now be exempt from the payment of this check.

Verdict set aside.

CASES DETERMINED  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF NEW JERSEY,  
AT JUNE TERM, 1863.

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THE STATE v. ISAAC STONE.

The stealing of lead water-pipe, fixed to a paper mill, is indictable under the 66th section of the statute respecting crimes. *Nix. Dig.* 188.

For the State, *H. C. Pitney.*

For the defendant, *A. W. Cutler.*

VREDENBURGH, J. The defendant was convicted, in the Morris Oyer, of stealing two hundred pounds weight of lead water-pipe, fixed to a paper mill of Joseph Alexander. Whereupon the court reserved the question, whether the defendant could be legally convicted under the statute. *Nix. Dig.* 188, § 66.*

This section provides that if any person shall steal or shall rip, cut, or break, with intent to steal, any lead or iron bar, iron rail, iron gate, or iron palisade, or any lock fixed to any building of another, he shall be deemed guilty of a misdemeanor.

* *Rev.*, p. 250, § 132.

State v. Stone.

It is contended, on the part of the defendant, that the terms of the act do not include lead water-pipe, but only lead bars; that the term lead is used as an adjective. The act in question is a copy of the act of 4th George 2d, chapter 32, with the exception that the act of George leaves out the word "or" between the words lead and iron, so as to read any lead, iron bar, iron rail, &c. Was the insertion of the word "or" in our act intended to limit the subject of the act, so as to embrace only lead bars fixed to a building, when by the act of 4th George 2d *all* lead whatever fixed to a building is included? I do not think such could have been the intent of the legislature. The word lead was used as a substantive clearly in the act of George, and there was no reason to use it as an adjective in our act of 1796. The same reason existed for using it as a substantive in our act, as in that of George. At both periods, lead was affixed usually to buildings, not in bars, but in sheets, for roofing purposes. On account of its extreme malleability, rogues were in the habit of ripping it off the roof. If our legislature of 1796 intended to use the word lead as an adjective, they must have intended to deprive the act of nearly all its effective force, for lead in bars was not, either at the time of the act of George or our own act of 1796, usually affixed to buildings in that shape. The verb "rip," also in the act, applies properly to lead in sheets, on the roofing, or in other shapes than bars. Bars of lead or iron might be broken or cut, but with respect to lead in that shape the legislature would hardly apply the term "rip." The whole context also shows the word lead is used as a substantive. If it was used only to qualify the noun "bar," why not have repeated it, as well as the word "iron," before each of the other nouns in the sentence; so as to read, if any person shall rip any lead or iron bar, lead or iron rail, lead or iron gate, lead or iron palisade? From the history of the use of lead in buildings, we certainly should have expected our legislature to have used the word lead in the same sense as it was used in that of George. We should hardly expect the legislature to

Lyons v. Davis.

go to the trouble of protecting lead in its most unusual form, and not protecting it in the form in which it was, when our act was first passed, almost exclusively used. From the softness of lead, it required protection in all its forms; while from the hardness and tenacity of iron, that only wanted protection in the forms specified in the statute, and that is the reason of its peculiar language.

The Oyer should be advised accordingly.

OGDEN and BROWN, Justices, concurred.

LYONS AND BENNET v. JAMES DAVIS.

1. This court will not weigh the evidence on a *certiorari*, and will not reverse, unless it appears that some principle of law has been violated.
2. If evidence is improperly admitted because a writing was not produced, this court will not reverse if the writing was afterwards given in evidence.

This was a *certiorari* to the Court of Common Pleas of the county of Hudson in a case of appeal from the judgment of a justice.

Argued before HAINES and ELMER, Justices, by *F. H. Teese*, for plaintiffs, and *S. B. Ransom*, for defendant.

The opinion of the court was delivered by

ELMER, J. The state of demand in this case claimed wages due to plaintiff, from October 20th, 1857, to January 20th, 1858. Judgment was rendered on the appeal in favor of the plaintiff below for forty-four dollars debt and costs.

The state of the case contains the evidence on both sides at length. Its relative weight, and the conclusions of fact to be drawn from it, are not questions to be considered on this *certiorari*. Unless it appears that some principle of law has

Lyons v. Davis.

been violated, to the prejudice of the party prosecuting the writ, the judgment must be affirmed.

Evidence was produced that Davis had worked for Bennet & Co., and for Bennet alone, before the partnership of Lyons and Bennet was formed, which was on the 20th of October, 1857, and continued until the 20th of January, 1858, when it was dissolved. Some wages were due him for work previous to the partnership between Lyons and Bennet. When this partnership was formed, the hands previously employed refused to continue working, unless the new firm would pay the arrearages, which both of them agreed to do. Davis continued to work, and Bennet, the resident partner, from time to time paid him money, without designating whether it was paid for the old wages or on account of the new firm. The old accounts were continued in the books, as if there had been no change of partners. After the dissolution of the firm, Mr. Lyons sent his son and two other persons to settle up the books. They went over Davis' account, and gave him a small book in the handwriting of the son, all of them being together, stating the balance due to him from Lyons & Bennet to be \$36.75, and for this sum, with interest, the judgment appears to have been rendered.

It is immaterial now whether other evidence in the case did or did not show a different state of facts. For aught that appears, the court which tried this case, as judges of the fact as well as of the law, may have considered the weight of evidence to have established the facts as above stated; and if they did, their judgment was not erroneous. They had a right to infer, and we must presume did infer, that the payments made to Davis by Bennet were made and received to pay the old account until that was extinguished, and that the balance stated in the book to remain unpaid, was for work done for the new firm.

In the progress of the trial, the witnesses were asked certain questions in reference to the agency of Lyons' son, and the arrangement between Bennet and Lyons about paying the wages due the hands, and as to what Lyons said in reference

State v. Council of Newark.

to paying them. These questions were objected to on behalf of the defendants below, on the ground that the articles of partnership and of dissolution, which were in writing, were the best evidence of them, and ought to be produced. But it appears, by the case, that both these papers were subsequently produced and read by the defendants; so that if the court erred, these errors became wholly immaterial, and were cured. 2 *South*. 765; *Kutzmeyer v. Ennis*, 3 *Dutcher* 372.

Even if these errors had not been thus rendered immaterial, they were not of such a nature as would have materially injured the defendant, and would not, therefore, have justified a reversal. The particulars of the son's agency were not important, and the declarations of Lyons, as to paying the hands, were facts outside of the writings.

The judgment must be affirmed.

THE STATE, JEREMIAH DOYLE & CO., PROSECUTORS, v.
THE MAYOR AND COMMON COUNCIL OF THE CITY OF
NEWARK.

1. The charter of the city of Newark requires certain ordinances to be published for a certain time, and in a certain manner, between their second and third readings. Such an ordinance having been read a second time, and ordered to a third reading, was reconsidered and taken up, and the vote of the last meeting ordering it to a third reading reconsidered, and a section of the ordinance materially amended. It was then, at the same sitting, ordered to a third reading, and finally passed: *held*, that when the vote ordering it to a third reading was reconsidered, and the proposed ordinance put again upon its second reading, it could not be lawfully read again without the notice required by the charter.
2. A *certiorari* for the purpose of removing an assessment, brought within a reasonable time after the assessment was ratified and confirmed, will not be dismissed because the ordinance which is thus brought incidentally in question was passed a long time previous.

On *certiorari* to remove assessment.

State v. Council of Newark.

HAINES, J. The assessment removed by the writ in this case is clearly defective, and as to the prosecutors, must be set aside. The ordinance providing for the regulating, grading, and paving of the street in question, and under which the expenses were incurred, was not lawfully passed.

First. It was not in pursuance of the notice of the proposed improvement.

On the first of April, 1859, a resolution was passed, expressing the intention of the common council to order and cause North Broad street to be regulated, graded, and worked to the established grade, &c., and directing the street commissioners to give public notice of that intention. Assuming that the notice was duly given, of which however there is no evidence before us, the ordinance, which was passed to carry into effect that intention, was not in accordance with the notice. The grade of the street at the date of the resolution, and at the time the notice should have been given, was that which had been established on the 6th of August, 1852. On the 3d of June, 1859, the grade was altered.

The ordinance for improvement, passed June 17th, 1859, referred to the grade then established, the grade of 1859, and not to be that of 1852, which was the established grade contemplated by the notice. The ordinance referred to the grade of 1859, the notice to that of 1852. Owners of property, who saw the notice of the intention expressed on the first of April, and its reference to the then existing grade, may have been satisfied with such an improvement, and have had no reason to make objection to it, and yet may have been surprised and aggrieved by an ordinance which required them to work to a different grade, and which they had no opportunity to oppose.

Secondly. The ordinance is defective for the further reason, that it was not published according to law. The 29th section of the charter of March 11th, 1857, provides that every ordinance involving expenditure of money or affecting personal property shall be published, for the space of ten days, in two daily newspapers printed and published in the

State v. Council of Newark.

city of Newark, between its second and third reading. On the third of June, the ordinance in question was read the second time, and ordered to have a third reading. On the 17th of June, it was taken up on a third reading, and on motion, the vote of the last meeting, ordering it to a third reading, was reconsidered, and the first section amended by adding the words, "except the westerly side thereof, between the Newark and Bloomfield turnpike and the line of Belleville township." And it was then, at the same sitting, ordered to a third reading, and finally passed. The amendment was in a material matter. It excepted from the proposed work the flagging of the sidewalk on the west side of much the larger portion of the street, yet no notice whatsoever of the alteration was given, or of the proposed ordinance as so amended. That which had been published provided for the flagging of both sides of the street, in its whole length; the ordinance passed, excepted the flagging of nearly all one side of it; and property owners, who were required to pay the expenses of it, may with propriety allege that they are aggrieved thereby. The charter contemplates that the common council, in their legislative capacity, act in accordance with the well established rules of parliamentary bodies, and that all amendments are made, and the proposed ordinance perfected on the second reading; and that the notice given between the second and third reading will inform parties interested of the precise character of the improvement intended. When the vote ordering it to a third reading was reconsidered, the proposed ordinance was again put upon its second reading, and could not lawfully be read again without the notice required by the charter. Had such notice been given, objections might have been presented, and reasons shown to prevent the final passage. In the absence of such notice, parties are surprised by an ordinance quite different from that, of which the former notice was given. There were other objections presented on the argument, but it is unnecessary to consider them at this time.

It is insisted, on the part of the defendants in *certiorari*,

State v. Council of Newark.

that the objections to the proceedings come too late. It is true the ordinance was passed on the 17th June, 1859, and the writ of *certiorari* was not allowed until March, 1862. But it appears that the assessment complained of was not ratified and approved until the 10th February, 1862. The court, in the exercise of its discretion in granting writs of *certiorari*, has usually required them to be brought within a reasonable time after the cause of complaint arose. Had this writ been directed to the removal of the ordinance only, it would have been denied; or if through inadvertence allowed, it would have been dismissed as soon as the *laches* came to the knowledge of the court. *Haines v. Campion*, 3 *Harr.* 61; *State v. Kingsland*, 3 *Zab.* 85; *State v. Everett*, *Ibid.* 579; *State v. Woodward*, 4 *Halst.* 21; *State v. Newark*, 1 *Dutcher* 400; *State v. Jersey City*, 2 *Dutcher* 444; *State v. Jersey City, Malone, prosecutor*, decided at February term, 1863. *Ante* 247.

But the writ removes also the assessment, and was brought within two months after its ratification and approval. The ordinance is before us; and as it is the foundation of the whole proceedings, we are obliged to examine it, in order to ascertain the validity of the assessment, and it is thus brought incidentally in question. The complaint is, that the assessment is erroneous, the result of an illegal ordinance, and that the prosecutors are aggrieved by it. They could not know how it would affect them till the assessment was made and ratified. There was no want of diligence in prosecuting the writ of *certiorari*. This is in accordance with the opinions expressed in the cases of *The State v. Newark*, 1 *Dutcher* 400; *The State v. Jersey City*, 2 *Dutcher* 444; *The State v. City of Hudson*, 5 *Dutcher* 475.

Let the assessment, as to the prosecutors, be set aside, and for nothing holden.

ELMER, J., concurred.

CITED in *State v. Atlantic City*, 5 *Vroom* 101; *State, Gregory, pros., v. Jersey City*, 5 *Vroom* 434; *State v. Blake*, 6 *Vroom* 213; *State v. West Hoboken*, 8 *Vroom* 82.

State v. Town of Bergen.

THE STATE, JANE VANHORN, PROSECUTRIX, v. THE TOWN OF BERGEN.

1. The council has no right to assess the expenses of improving a street, incurred by individuals by authority of the council, which was not contracted for or superintended by the council.
2. The decision of the case, 5 *Dutcher* 266, concurred in. The assessors were bound to show that they took into consideration all the real estate of the town, and determined what part was benefited.
3. An act of assembly, directing that, in case an assessment should be set aside, new assessors should be appointed, *held* not to authorize a new assessment against an individual whose tax was not set aside, but had been paid and accepted by the council.

This was a *certiorari* bringing up an assessment for a street improvement, and was argued before Justices HAINES and ELMER, by *B. Williamson*, for the prosecutrix, and by *I. W. Scudder*, for the town of Bergen.

The opinion of the court was delivered by

ELMER, J. By virtue of an act, approved in 1855, entitled, "an act to incorporate the town of Bergen, in the county of Hudson," the council of that town passed an ordinance, in 1857, for the regulation and grading of Washington avenue, from the Communipaw road to the Jersey City and Bergen plank road.

In a few days after the adoption of this ordinance, certain owners of property, lying in that part of said avenue from Communipaw road to the bridge over the Morris canal, which is between the two roads named, petitioned the council in writing for permission to grade and flag the same, which was granted. Proposals for the work on the other part of the avenue were received, and contracts entered into. The council took no part in contracting for or superintending the work done between the Communipaw road and the canal.

Assessors were appointed to assess the cost and expenses, who, in February, 1858, made a return, assessing upon several land owners the sum of \$6369.44, of which amount

State v. Town of Bergen.

The sum of \$1760.33 was assessed on Mrs. Vanhorn, the present prosecutrix. This assessment was confirmed by the council, April 2d, 1858, and on the 8th of the month, Mrs. Vanhorn paid it to the treasurer of the town, and it was formally accepted by the council.

It would seem that the sum so assessed did not include the expense of improving that part of the avenue between the Communipaw road and the Morris canal. As the owners of the land fronting on that part were assessed for some portion of the expenses incurred for improving the avenue between the canal and the plank road, several of them sued out writs of *certiorari* from the Circuit Court of the county of Hudson, which court set aside the confirmation of the assessments for the want of due notice, and ordered the assessments and proceedings to be remitted to the council to proceed anew. Thereupon the council gave a new notice of a meeting to confirm said assessment, and in October, 1859, did formally confirm it.

After this second confirmation, eight of the same persons, who had prosecuted the writs of *certiorari* issued out of the Circuit Court, became the prosecutors of a writ of *certiorari* issued out of this court, and such proceedings were had that, at February term, 1861, this court adjudged the assessments and proceedings to be void, and ordered that the same be set aside, reversed, and for nothing holden; and that the prosecutors in said *certiorari* be restored to all things they had lost thereby. It appears, by the report of the case, *State v. Bergen*, 5 *Dutcher* 266, that this judgment was made on the ground that the assessors, instead of assessing all the owners of land in the town who were benefited by the improvement, as required by the charter, assessed only those whose property fronted on the avenue, or who petitioned for the improvement.

In March, 1859, a supplement to the charter was passed (*Pamph. acts*, p. 271,) providing, that in case any assessment or estimate of value, made by commissioners or freeholders, should be set aside, in whole or in part, by any court or by

State v. Town of Bergen.

the councilmen, &c., it should be lawful for the councilmen to appoint three freeholders, who should proceed to make such assessment, in whole or in part, as the case might require, which assessment should include the expenses of the work done and materials furnished, with interest thereon, &c.

By virtue of this act, the council, in January, 1862, appointed new assessors, to assess the costs and expenses of grading and regulating, and laying sidewalks, &c., upon Washington avenue, from the Communipaw road to the plank road. In March, these assessors presented their map and report, which, in April, were confirmed.

This assessment is for the aggregate sum of \$19,917.77, there having been added to the sum originally assessed \$9440.64, for the work done between the Communipaw road and the Morris canal, with interest from the date of the confirmation of the first assessment and sundry incidental expenses. Mrs. Vanhorn is now assessed the sum of \$6403.97, and the question to be decided is, whether it has been legally imposed on her.

In my opinion this assessment was altogether unwarranted and illegal.

First. Because the assessment originally made on her was never, within the meaning of the supplement of 1859, set aside. It is true the judgment of this court was rendered in general terms, that the assessments and proceedings should be set aside, reversed, and for nothing holden; but the meaning and effect is, that it was set aside as against the prosecutors, who alone were to be restored to all things they had lost thereby. The well understood practice of the court is not to allow a *certiorari* to question and set aside assessments in gross, but only to bring up those made upon the prosecutors named in the writ; and if the original proceedings are defective, only to set aside such assessments. 1 *Dutcher* 400. The present prosecutrix was no party in the case decided: she had not complained of the assessment, but on the contrary, had paid the amount claimed of her. The whole assessment was adjudged to be illegal, and of course it was

State v. Town of Bergen.

illegal as to her; but having acquiesced in it, and paid the money, and the council having accepted it, the proceeding, as to her, was final, and concluded both parties.

Secondly. The charter of 1855 was loosely drawn, but I think the fair interpretation of it is, that the council could only order assessments for money expended by them, under their express supervision and authority. They had no power to subject property owners to such expenses for improvements, as other interested parties might think proper to incur with their consent and acquiescence. It is plain, that the alleged cost of the work between the Communipaw road and the canal, was not an expense incurred by the council; they did not contract for it, did not superintend it, or in any way control it, and had not paid, or rendered themselves liable to pay any part of it, when the assessment was made.

Thirdly. The assessment was not made upon the principle required by the charter. The opinion pronounced in this court, when the first assessment was before it, appears to me to be correct. But whether it is or not, until reversed by a higher court, it must be respected and conformed to by all inferior tribunals as the law.

This, I think, was not done by the new assessors. They do not certify, in the words of the charter, that they assessed "upon principles of equity and according to the damage or benefit the owner or owners thereof may derive therefrom, the real estate in said town."

They certify that they made the assessment upon principles of equity, and that "we did, in our judgment, consider and adjudge that the owners of the said several lots and plots of ground were the parties benefited, and upon whose lots and plots the assessment should be made;" but this language does not imply that they took into consideration all the real estate in the town, and determined what part of it and how far it was benefited or damaged, and assessed accordingly. It is plain from the whole case, I think, that they did not do this.

We were referred to the 28th section of the new charter, granted in 1862, (*Pamph. acts*, p. 173,) as sanctioning the prin-

Parker v. Thompson.

ciple, that only the property fronting upon the improvement can justly be assessed. But the entirely different language of this act serves to show very clearly, that the true meaning of the original charter was very different. Upon referring to the 27th section of the new act, it will be seen that the rights of the property owners are carefully guarded, by requiring a preliminary estimate and assessment of the costs to be filed, and by putting it in the power of the owners of two-thirds of the lands to be assessed to arrest the proceedings. Nothing of this kind was contained in the charter under which the assessment in question was made, there not being the same reason for it as now, that the whole expense of an improvement is to be borne by those owning the property where it is made, although other property owners may, in fact, be the most benefited. The assessment, as against the prosecutrix, must be set aside.

Assessment set aside.

CITED in *State v. Gardner et al.*, 5 *Vroom* 331; *State, Little, pros., v. New-ark*, 7 *Vroom* 172.

CHARLES I. PARKER AND LEWIS L. PARKER v. JOSEPH C. THOMPSON.

1. It seems that the representatives of one of the defendants in a joint judgment who has died may be sued, although the other defendant is living.
2. The plaintiff in an action against executors of their own wrong is not a competent witness.
3. The judgment against executors of their own wrong should be special, and not general.

This was a *certiorari* to a justice of the peace, before whom the action was tried, and judgment rendered in the absence of the defendants. Argued before Justices HAINES and ELMER, by *J. D. Bedle*, for the plaintiffs in this court, and by *F. Kingman*, for the defendants.

The opinion of the court was delivered by

ELMER, J. The plaintiff in the justice's court, who is the defendant in this *certiorari*, sued the defendants, as executors of their own wrong of Mary Parker, deceased, to recover the

Parker v. Thompson.

amount of a judgment obtained by him against Joseph Parker, who is still living, and the said Mary Parker.

It is now objected that this action cannot be sustained. I am not satisfied, however, notwithstanding what was said by one of the judges in the case of *Wade v. Potter*, 2 *Green* 278, that our statute does not cover this case. *Nix. Dig.* 542, § 4.* The words are, that the representatives of one jointly bound with another for the payment of any debt may be charged, by virtue of such obligation, as if the obligators had been bound severally as well as jointly, and are, in my opinion, broad enough to cover the case of two or more jointly bound by a judgment. There is no force in the objection, that if a new judgment may be obtained against the representatives of one who is deceased, there will be two judgments for the same debt; this being no more than what may happen in any case where two or more are bound severally. But it is not necessary to decide this question.

The judgment is erroneous for other reasons. It appears, by the transcript of the justice, that the only evidence of the plaintiff's demand was his own testimony and the record of the original judgment. The defendants being sued in a representative capacity, the plaintiff was not a competent witness. There was therefore no legal evidence to charge the defendants as executors of their own wrong.

The judgment against executors must be special, and not general. *Penn.* 457; *South.* 686; 1 *Wm's Ex'rs* 142. Our statute, *Nix. Dig.* 255, § 9,† provides that executors of their own wrong shall be answerable so far only as the goods and debts coming to their hands will satisfy. If facts are proved in a justice's court to render them liable, the judgment should be that the plaintiff recover the debt and costs, to be levied out of the assets of the testator, if the defendant have so much, but if not, then to levy so much as they are liable for and the costs out of their own goods.

The judgment must be reversed.

Wade v. Potter, 2 *Green* 278; 11 *Green* 222.

* *Rev.* c. 74, § 3. † *Rev.*, p. 396, § 3.

Beneficial Society of Burlington v. White.

THE BENEFICIAL SOCIETY OF THE CITY OF BURLINGTON
v. TYLEE W. WHITE.

A state of demand against a beneficial society claiming a balance alleged to be due during the plaintiff's sickness, at the rate of three dollars per week, "the sum paid by said society to the sick of said society," held not to contain a legal cause of action.

This was a *certiorari* to the Common Pleas of the county of Burlington, in a case of appeal from the judgment of a justice; argued by *F. Kingman*, for plaintiff, and *A. Brown-ing*, for defendants, before HAINES and ELMER, Justices.

The opinion of the court was delivered by

ELMER, J. No principle is better settled, than that a state of demand which does not state facts enough to establish the liability of the party sued, without the necessity of supplying other facts by proof, is radically defective, and will not support a judgment. Unfortunately for the plaintiff in the court below, who we must presume has a meritorious claim against the defendants, he has failed to show it to be legal. His demand is for the balance alleged to be due him from a beneficial society during his sickness, thirty-five weeks and one day, at the rate of three dollars per week, "the sum paid by said society to the sick of said society;" but he does not state how the obligation to pay this money arises, what the rules and regulations in regard to beneficiaries are, or that he has complied with such rules; all of which was necessary to render them liable to an action.

The judgment must be reversed.

Tice v. Reeves.

REBECCA A. TICE v. MOSES E. REEVES.

In a suit by the mother against the father for the support of their child, it is incompetent for the mother to prove that the father has made parol admissions that they have been divorced.

On case certified from the Essex Circuit.

The plaintiff brought her suit against the defendant for the support and maintenance which the plaintiff, as mother, had provided for their child. Some time after marriage the parties separated, and plaintiff married a second time to a man named Tice, who died some three years before the suit was brought. After his death, the child was supported entirely by the plaintiff. The defendant refused to contribute to the support, alleging, as a reason, that the child was not his, having been born six months only after the marriage.

On the trial, there was a verdict for the plaintiff, subject to the opinion of the court at bar on several questions, which were duly certified. The principal one was as to the admission of parol evidence, offered on the part of the plaintiff to prove the admission of defendant that he had been divorced from the plaintiff. This evidence was admitted by the court, and there was a verdict for the plaintiff. It was now insisted that the evidence was incompetent.

For the plaintiff, *C. Parker*.

For the defendant, *O. S. Halsted*.

VREDENBURGH, J. The plaintiff was married to the defendant at Newark, in this state, on the 15th November, 1849, and six months afterwards had a child. The plaintiff was again married, six or seven years ago, to one Tice, who died about three years ago, and since his death the plaintiff has always supported the child. About two years ago, the plaintiff applied to the defendant to pay the board of the

Tice v. Reeves.

child, who refused because, as he said, the child was not his. One of the plaintiff's witnesses was asked, has the defendant ever admitted to you that he had been divorced from the plaintiff? which, being objected to, was admitted by the court, and the witness answered that he had often, and that the defendant was now married to another woman.

The first question certified is, whether this question and answer were legal?

It is clear that, unless divorced, the wife could not bring this suit against the husband; she could only bring it upon the assumption that the relation of husband and wife did not exist at the time of the institution of the suit. This is sought to be proved by a parol admission by him, that they had been divorced. The fact stated by the witness, that the defendant had married again, may prove bigamy, but cannot prove divorce. The question therefore rests upon the competency of the question, "Has the defendant ever admitted to you that he has been divorced from the plaintiff," and the answer, "He has often."

It appears to me that the question is incompetent. In the first place, it is not specific enough. It does not specify whether it was a *divorce a mensa et thoro*, or a *vinculo matrimonii*, and therefore the answer can prove nothing. How can we infer from the question and answer the one more than the other, and yet both are equally recognized by our laws.

But again, even if the question had been asked specifically, if the defendant had admitted he had been divorced *a vinculo matrimonii*, it was incompetent to prove it by parol. The plaintiff was married in 1849. The presumption is, if divorced at all, it was by the authorities of this state, there being no proof or admission that it was done anywhere else. Since 1849, it could only be by decree in Chancery, and the best evidence of that is the decree itself, or a duly certified copy of it. It would be utterly inadmissible to prove the contents of such decree by parol. By the terms of the statute, *Nix. Dig.* 224, § 9, the Court of Chancery may take such order touching the care and maintenance of the children by the

Farmers and Mechanics Bank v. Green.

husband as may be reasonable and just; and so this very question may have been adjudicated by the proper tribunal. Is this all to be a matter resting on parol proof, when the record evidence is within reach?

The presumption, in the absence of all proof to the contrary, is that if there was a divorce at all, it must have been made in our Court of Chancery, and that the Chancellor regulated and provided in the decree for the proper support of this child by the husband, and the remedy, if any, is upon the decree itself.

The principle recognized in sections 96 and 97 of *Greenleaf's Evidence*, to which we are referred, is quite different from this.

This result makes it unnecessary to examine the other questions raised. The verdict below should be set aside.

OGDEN and BROWN, Justices, concurred.

THE FARMERS AND MECHANICS BANK v. ENOCH W. GREEN.

A firm in the country was dissolved in 1849, and no notice of dissolution given. In 1860, one of the partners drew a note, and signed to it the name of the firm without the knowledge or consent of the other partner, and such paper was discounted by a bank in Philadelphia without inquiry. *Held*, that such note was not binding on the firm.

This suit was brought by the plaintiff to recover the amount of a promissory note for \$409.21, with interest. The issue was tried at the Mercer Circuit, and a verdict rendered for defendant. A rule was granted to show cause why the verdict should not be set aside. The facts of the case are fully shown in the opinion of the court.

For the plaintiff, *M. Beasley*.

For the defendant, *F. Kingman*.

Farmers and Mechanics Bank v. Green.

VREDENBURGH, J. This was an action brought by the bank against the defendant, as one of the drawers of a promissory note, of which the following is a copy :

\$409.21. GREENSBURGH, N. J., June 27, 1860.

Five months after date, we promise to pay to the order of Green, Brother & Cooper, four hundred and nine $\frac{21}{100}$ dollars, without defalcation. Value received.

Payable at Philadelphia, at 118 Walnut st.

ENOCH W. GREEN & Co.

Endorsed Green, Brother & Cooper.

It was proved, at the trial, that this note was discounted by the plaintiff in the regular course of its business.

The defence set up was, that at the date of the note there was not, and had not been for several years, such a firm as that of Enoch W. Green & Co.; that the note was made by Philip Green, who drew it, and signed thereto the name of Enoch W. Green & Co. without the knowledge or consent of the defendant, procured the note to be discounted, and appropriated the proceeds to his own use. It appeared in evidence that Philip Green and Enoch W. Green were brothers, and that Philip died the 29th of October, 1860.

I think the jury were warranted by the evidence in finding the following facts :

1st. That at the giving of the note there was no such firm in existence as Enoch W. Green & Co.

2d. That the note in question never was drawn or signed by Enoch W. Green, or with his knowledge or procurement.

3d. That the note was made and signed by Philip Green, for his own use, and so appropriated without the knowledge or consent of the defendant.

4th. That if any such firm as Enoch W. Green & Co. ever existed, it was dissolved so early as 1849.

5th. That no business had ever been done between the plaintiffs and the firm of Enoch W. Green & Co, prior to the dissolution as aforesaid.

No notice of the dissolution was given. But the jury may

Farmers and Mechanics Bank v. Green.

have gone upon a another ground, *viz.* that although the plaintiffs may never have had any notice of dissolution of the old firm of E. W. Green & Co., yet that if, after the actual dissolution of the old firm, the plaintiff, as a new customer, saw fit to come in and deal with one of the partners, as if the old firm was still in existence, without inquiry, that he did so at his own peril.

It is a principle of law, that if a retiring partner gives no notice, then a customer of the firm accustomed to trade with the firm on the responsibility of all the partners, not knowing of the retirement, may hold such retiring partner for a debt contracted with the firm after the retirement. *But a new customer generally cannot.* 1 *Par. on Contracts* 145. This raises two questions.

1st. Had the jury a legal right to conclude, from the evidence, that the plaintiff had ever dealt with the old firm of E. W. Green & Co. prior to the dissolution?

2d. If the plaintiff had not so dealt, is there anything in this case to take it outside of the general rule?

This first leads to an examination of the evidence upon the following questions:

1st. What is the evidence upon the question, whether there was any such partnership at all as that of E. W. Green & Co.?

2d. If there was, when did it commence and when did it end?

3d. When did the plaintiff commence to deal as if with the firm of E. W. Green & Co.?

4th. What circumstances are there, if any, which would take this case out of the general rule of law, which prohibits a new customer from holding a firm responsible for an act of one of the partners, after dissolution without notice?

First, as to the proof that there ever was such a partnership at all as that of E. W. Green & Co.

The only act ever proved to have been done by E. W. Green from which a partnership could be inferred, as against him, is that, in 1843, he wrote the name Enoch W. Green & Co. in the signature book of the Trenton Banking Company.

Farmers and Mechanics Bank v. Green.

The proof is that Enoch W. Green never bought or sold an article for or in the store, was never there in any other capacity than as an ordinary customer, never drew or paid a note, was never consulted about anything. He was in every other respect, except as to this signature in the bank, an utter stranger to the whole business.

There is one other fact, not an act, so far as the proof goes, of E. W. Green, that a sign lettered Enoch W. Green & Co. was put upon a bridge belonging to Philip Green for some time. But the evidence is, that he protested against its being so up. He always protested he was no partner. Philip always averred he was no partner. Philip did all the business, and took all the proceeds. There is not the slightest proof that Enoch ever received or claimed a cent from the firm in any shape whatever. There is no evidence that the plaintiff ever knew of this signature in the bank. This alleged store was a small shanty in the country, on the canal near Trenton, having in it from \$100 to \$250 worth of the two great staples in trade, rum and tobacco, while the store of Green, Brother & Cooper was a large concern, at 118 Walnut street, Philadelphia, and the plaintiff one of the largest banks in the city of Philadelphia.

Can we say that the jury could not legally conclude, from these facts, that there never had been any such partnership at all as that of E. W. Green & Co.? Might not the jury legally conclude, that inasmuch as the defendant received no part of the profits, and meddled in no way with the concern, that the signature in the bank was only to give his brother Philip credit in that particular bank, which would make the defendant liable in that bank as a partner; but which other banks, acting without any knowledge of such signature, would have no right to use as proof of partnership as between him and them? And as regards the sign, there is no evidence that it was put up by Enoch, or even assented to by him; it was not put on his building, or on a store containing any goods he claimed to be interested in, but put upon Philip's building, and in the goods in which he, Philip,

Farmers and Mechanics Bank v. Green.

claimed to be sole owner. The evidence is, that Enoch protested against it, until he finally prevailed with his brother Philip to take it down. Now had not the jury the right to infer that the sign was put up and kept up without Enoch's consent, and therefore legally conclude that there never was any partnership at all? Now it might be that the signature of E. W. Green & Co. and the sign, might make Enoch liable to third persons, if they discounted this note on the faith of these acts, even if Enoch and Philip were not partners in this alleged firm of E. W. Green & Co.; but then it should appear that they discounted this note by reason of their knowledge of this signature in the bank and the sign, and were deceived thereby. But here there is no such evidence. So that, so far as regards the plaintiff here, the jury had a right to infer from the evidence—first, that there was in fact no partnership; and second, that Enoch W. Green had done, or permitted nothing to be done, which induced the plaintiff to give credit to this paper in the name of E. W. Green & Co. Indeed the weight of the evidence appears to me decidedly—first, that Enoch W. Green and his brother Philip were not in fact in partnership, and that Enoch did nothing which induced the plaintiff to give credit to this paper which was issued in its name.

But suppose we are wrong upon this point, and that it was not permissible for the jury to draw such inferences from the evidence. The next inquiry is, when did this partnership commence, and when did it end? If it commenced at all, it must have been in 1843, when Enoch gave his signature to the Trenton Bank. When had the jury a legal right to infer that it ended? Mr. Cooper, the main witness of the plaintiff says, the store at Greensburgh was closed up in the latter part of 1849, but the account is carried to 1853, because the old debts were paid after the store was closed. Mr. Vannoy says he was in the employ of Green, Brother & Cooper, and in 1849 went up to Greensburgh, and packed up the goods in the store in two small boxes, and sent them to Philadelphia.

In the two boxes were about \$50 to \$75 worth of goods,

Farmers and Mechanics Bank v. Green.

having first sold about \$70 out of the store to the neighbors. Then a man by the name of Hill carried on business there for his own account. Philip said the whole of the goods belonged to him. There was sold and unsold only about \$150 in rum and tobacco, &c., and every dollar of this was taken by Philip, as well as such property as there was, and the store closed up. I think the jury was not only justified, but forced by the evidence to conclude, that if any such firm as Enoch W. Green & Co. ever existed, it was finally closed by Philip's taking all the goods under a claim of right, and closing the store in 1849. The evidence shows most conclusively that Enoch never afterwards interfered in any way in the matter, except when he heard of Philip's using his name to notes in Philadelphia, to forbid it, and to try to persuade Philip to take the sign down. The sign he did get down in 1857, but Philip, against the protestations of Enoch, secretly used his name to notes in New York and Philadelphia for his own private purposes until he died, in 1860, and the fraud was exposed.

Now when did the plaintiff first commence to deal with this alleged firm, E. W. Green & Co.? The evidence of Mr. Cooper is, that the bank had been in the habit of discounting similar papers for the large concern of Green, Brother & Cooper, in Philadelphia, from eight to twelve years—taking the longest time named, twelve years. This would make the commencement in 1850, which was a year after the dissolution, and while the store at Greensburgh was entirely closed, or Hill doing business there for himself. But Vanoy says, and the jury had a right to believe him, that he was in the employ of Green, Brother & Cooper from 1849 to 1852, and that no paper signed E. W. Green & Co. was discounted at the plaintiff's bank. So that the jury was justified in concluding that the plaintiff did not discount any of this paper signed E. W. Green & Co. until 1852. Now how stand the facts? E. W. Green, if he ever was in it, retired from the firm in 1849; the plaintiff, who never dealt with the firm during its actual existence, three years after its dis-

Farmers and Mechanics Bank v. Green.

solution, discount, in Philadelphia, for Green, Brother & Cooper, paper which had been fraudulently made by Philip Green, signed in the name of E. W. Green & Co., and continue to do so until it discounted the note in question, in June, 1860, eleven years after the dissolution, and that without inquiry. Under such circumstances, the defendant is not liable. The plaintiff being a new customer of the firm, ought not to have taken for granted the existence of the firm. The inquiry should have been, not if any such firm had ever existed, but whether it was at the first credit an existing thing. Otherwise how is a retiring partner ever to be protected against the fraudulent acts of his copartners? This case itself is a good illustration of its effects. Here, for eleven years after the smallest kind of a country apology for a store had been closed up, every particle of goods taken to Philadelphia by the partner, then that partner fraudulently, without the knowledge or consent of the retiring partner, manufactures paper with his name, to the amount of thousands of dollars, to be shayed in New York and Philadelphia, or any distant point from the place where the apology for a store was pretended to be kept.

When a partner retires there is sense and safety in requiring him to notify the old customers, for he is presumed to know who they are. But how is he to know or notify new customers? How is he to notify all who, in every place, however distant, and at any future distance of time, may see fit to take without inquiry the fraudulent paper made by other members of the firm? For what we know to the contrary, this bank came into existence after the dissolution, and notice consequently impossible.

It is true a retiring partner may so act as to cause the new customer to be misled and to give credit; but then he becomes responsible by such acts, if they actually induced the credit. There is no pretence of any such act here. The bank did not know E. W. Green.

The paper was in fact discounted on the credit of the firm in Philadelphia. The bank was not induced to discount the

Grant & Kelly v. Chambers.

paper by any act of Enoch W. Green, or at least the jury were justified in concluding, from the evidence, that it was not. The only fact that could ever so little look that way was, that the sign of E. W. Green & Co. remained until 1857. But this was three years before this note was discounted; and even if it had not been down at all, there is no evidence that the plaintiff knew or had ever heard it was up, and therefore could not have given the credit on that account; or, if known, would it have justified a bank in Philadelphia in dealing with E. W. Green & Co., as a firm, upon the bare information that an old sign had once been up, upon a small shanty in the country?

I think the jury were not only justified in concluding, but were bound by the evidence to conclude, that when this paper was given, there was in fact no such partnership as that of E. W. Green & Co., and that the defendant had done nothing which justified the plaintiff in either trusting or holding him as a partner, and that the rule should be discharged.

Rule discharged.

GRANT & KELLY v. ROBERT AND ABNER R. CHAMBERS.

A suit was brought by the plaintiffs against the defendants on a note purporting to be for \$1500. The defence set up was forgery; the parties compromised the suit by the defendants giving the plaintiffs a new note for \$1000, and upon suit brought on the last note—*held*, that the compromise was a good consideration for the new note, and that the defendants could not set up as a defence that the first note was a forgery.

On rule to show cause why verdict for the plaintiffs, rendered in the Mercer Circuit, should not be set aside.

For the plaintiffs, *A. Dutcher*.

For the defendants, *F. Kingman* and *J. P. Stockton*.

Grant & Kelly v. Chambers.

VREDENBURGH, J. This was a suit brought on a promissory note, given by Robert Chambers, to the order of Abner R. Chambers, for \$1000, dated September 23d, 1861, at sixty days, without defalcation or discount, payable at the Trenton Bank, and endorsed to the plaintiffs by Abner R. Chambers.

The plaintiffs, having proved the note and notice of protest, rested.

The defendants then offered to prove that a former suit had been brought by the plaintiffs against Robert Chambers, on a note for \$1500, alleged by Chambers to have been altered from a \$100 to a \$1500 note, and consequently a forgery, and that the consideration of the \$1000 note now in controversy, was founded upon the compromise of the former suit upon the said \$1500 note, which offer the court overruled, and a verdict was taken for the plaintiffs; and the question with us now is, whether the \$1000 note was given without sufficient legal consideration.

It is contended that the only consideration of the \$1000 note was a worthless piece of forged paper, a note altered from a \$100 to a \$1500 note, and that consequently the \$1000 note is void as between these parties.

It is true, as contended by the defendants, that if the only consideration of the \$1000 note was a forged piece of paper, that the defence might be a good one; but such is not the true consideration of the \$1000 note.

A suit is brought by the endorsee against the drawer and endorser of the \$1500 note. The defence is, that the drawer's name is forged: the parties get together to talk the matter over; the plaintiffs say the note is genuine; the drawer and endorser say it is a forgery. Finally, the defendants say to the plaintiffs, if you will withdraw this suit, I will give you a new note for \$1000 by way of compromise. The plaintiffs say they will take it; and the compromise is consummated by the plaintiffs withdrawing the old suit, and the defendants giving the new note for \$1000. Now, if when the \$1000 note was given it was admitted by both sides that the \$1500 note was a forgery, then the defendant's posi-

Grant & Kelly v. Chambers.

tion might be good. But then this would be no compromise ; it would be merely an agreement of the defendants to give the plaintiffs a note for \$1000 for nothing.

But the difficulty is, that upon a compromise the reverse is true. This arrangement is made upon an allegation, on one side, that the \$1500 note is a forgery, and on the other side, that it is genuine. The consideration of the new note, so far as the plaintiffs are concerned, is the getting a new note of \$1000 in the place of a \$1500 note, which, on trial, may perhaps turn out to be a forgery. To get clear of those chances, he is willing to lose \$500 on his claim. The consideration, so far as regards the defendants, is getting clear of the chances of a verdict against him for the whole \$1500, and to effect that, he is willing to pay \$1000. So that the forged paper is in no sense the consideration of the new note. How, in the nature of things, can the forged paper be the consideration of the new note, when at the very instant the defendants gave the new note to the plaintiffs the plaintiffs are averring that the old note is genuine? The consideration is a part of the contract, and can only be something that both parties agree upon to be the consideration. In order to make the forged paper the consideration of the new note, *both* parties must agree that the old note is a forgery, and give the new note under such an agreement. But the very nature of a compromise supposes, not that both parties agreed that the old note was a forgery, but that that precise thing was the very thing they were disputing about, and could not agree upon ; and so the parties not being able to agree upon the question whether the old note was a forgery or not, each party agreed to give and receive a new note for a lesser amount ; the one to avoid the risk of losing all, and the other the risk of paying all. The compromise itself was the consideration, as agreed to by both parties to the new note, and it is a matter of entire indifference whether the old note was genuine or a forgery.

This is not the case when there was an indictment for forgery, and the new note given upon an agreement not to

Green v. Howell.

prosecute. There was no such agreement here. If this new note be void from want of a consideration, the parties could never compromise when there was an allegation that paper is forged.

The rule should be discharged.

OGDEN and BROWN, Justices, concurred.

CHARLES J. GREEN, ADMINISTRATOR OF DEBORAH GREEN,
DECEASED, v. SAMUEL HOWELL, EXECUTOR OF DAVID
HOWELL, DECEASED.

A construction put upon a will having the following clause: "I give and bequeath unto my sister, M. G., wife of J. B. G., the interest of \$1000, the principal to be put out at use on safe security, and the interest thereof to be annually paid to her, for her own private use, during her natural life; and after her decease, I give and bequeath the said \$1000 to her two daughters, viz. Deborah and Sarah, equally to be divided."

Action on the case to recover a legacy.

David Howell, deceased, by his will, gave to his sister, Martha Green, wife of James B. Green, the interest of \$1000, the amount to be put out on safe security, and the interest thereof to be annually paid to her, for her own private use, during her natural life; and after her decease, he gave the said \$1000 to her two daughters, Deborah and Sarah, equally to be divided. Sarah, one of the daughters, died in the lifetime of the testator; Deborah survived the testator, but died before her mother, Mary Green. After the death of Mary Green, the plaintiff administered upon the estate of Deborah, and then brought this suit to recover a moiety of the \$1000, on the ground that the same became vested in his intestate, immediately on the death of the testator, and in the lifetime of her mother. The residuum of the estate was given by the will to the defendant, testator's brother.

To a declaration, setting out in substance the foregoing facts, and to which was annexed a copy of the will of David Howell, deceased, the defendant demurred.

Green v. Howell.

The demurrer was argued by *P. D. Vroom*, for the demurrant, and *M. Beasley*, for the plaintiff.

The opinion of the court was delivered by

VREDENBURGH, J. This suit is brought to get a construction of the will of David Howell, deceased. The difficulty arises under its third clause, which reads as follows: "3. I give and bequeath unto my sister, Martha Green, wife of Joseph B. Green, the interest of one thousand dollars, the principal to be put out at use on safe security, and the interest thereof to be annually paid to and for her own private use during her natural life; and after her decease, I give and bequeath the said one thousand dollars to her two daughters, *viz.* Deborah and Sarah, equally to be divided." The residue of the estate is given by the will to the defendant, who is also executor. This will is dated the 23d August, 1836, and the testator died shortly after.

Sarah, one of the daughters of Martha Green, died in the lifetime of the testator; Deborah, the other daughter, after the testator, but before her mother, Martha; and this suit is brought by her administrator to recover the one half of the said \$1000 legacy named in said third clause of the will.

The question is when the \$1000 legacy vested in Deborah, whether at the death of the testator or at the death of the mother. It is settled, by a long course of decisions both in England and in this country, that under the precise language of this will, the one half of this legacy vested in Deborah at the death of the testator. The principle laid down in 1 *Roper on Legacies*, marginal page 586, *viz.* "when the absolute property in a fund is bequeathed in fractional interests in succession, at periods which must arrive, the interest of the first and subsequent takers will vest together," is not only supported by the authorities digested there, but by numerous other cases decided in the English courts, and also by many decisions in this country. They are so numerous that it would be mere affectation to review them.

The cases to which we were referred on the argument are

Green v. Howell.

precise and to the point. I have examined all the cases to which we were referred by the defendant; but so far as I can understand them, they turn upon quite a different principle, viz. that besides the words in this will, there are some other words superadded, or some variety in the language, which requires some *uncertain* event to happen before the legatee is to enter into the enjoyment thereof, as, for instance, if the words "after her death, I give the \$1000 to her two daughters," the will here added, "if they survive their mother," or "if they arrive at twenty-one years of age." In all the cases cited on the defence the question has been, whether the words of the will did or did not imply some such contingency. In such cases the legacy clearly would not vest, because until the uncertain event happened, it never could be known whether it would or would not happen, and consequently whether the person named ever would or would not be entitled to enjoy, or answer to the description of the person named in the will. But the death of the mother was certain to happen sooner or later, and there never could be any doubt, that the event upon which the daughters would take would certainly come to pass.

The language of the will is equivalent to saying, I give this \$1000 to my sister and her two children; she to have it during her life, and they to have it after her death. The repetition of the words, "I give and bequeath," does not alter either the legal or common sense meaning of the terms used. It is a present gift of the whole interest in the fund. The cases cited by the defence give part of the interest absolutely; but whether the rest is given or not, is made to depend upon an event which may never happen. These distinctions run through all the cases.

The demurrer should be overruled, and judgment entered for the plaintiffs.

OGDEN and BROWN, Justices, concurred.

APPROVED, 2 *Vroom* 570.

CITED in *Thurston v. Roberts*, 3 *Stew.* 476; *Beatty's Adm'r v. Montgomery's Exors.* 10 *C. J. G.* 326.

Thompson v. Conover.

JOSEPH I. THOMPSON AND JOHN PETTY v. JOHN N. CONOVER.

Conover agreed to sell Cornelius Petty all the corn he had to sell, supposed to be in all about 600 bushels, the white at 65 cents, and the yellow at 63 cents per bushel. C. delivered the white, and offered to deliver the yellow, which Petty refused to receive: *held*, that the contract was an entirety, and the refusal of plaintiff to receive the yellow was a repudiation of the contract, and that C. could recover the value of the white in trover, and that he could do so even if, before demand and refusal, Petty had so mixed the whole corn as that it could not be identified. It was not error in the court charging the jury that C. could recover, even if the corn had been ground before demand and refusal.

Error to the Circuit Court of the county of Monmouth.

For the plaintiff in error, *J. D. Bedle*.

For the defendant, *M. Beasley*.

The opinion of the court was delivered by

VREDENBURGH, J. This was an action, brought in the court below, by Conover against the defendants, to recover 272 bushels of white corn; and the question was whether it was the plaintiff's property on the 16th of March, 1861. The facts were as follows: the plaintiff, being a farmer, and Cornelius Petty, a miller, met on the first of March, 1861. Conover asked Petty if he was buying corn. Petty replied he was, every day, and asked if he (Conover) had some for sale. Conover replied that he had about 600 bushels. Petty inquired what he asked for it. Conover replied, sixty-five cents a bushel. Petty asked if it was white or yellow. Conover replied, nearly half and half. Petty said he would give 65 cents for the white, but not for the yellow, and then said he would give 62½ for the yellow. Conover replied, make it sixty-three cents, and you shall have it. It was then agreed between the parties that Petty should give Conover 65 cents per bushel for the white, and sixty-three for the yellow, for all the corn Conover had to sell, supposed to be in all about

Thompson v. Conover.

600 bushels. Petty then asked Conover when he would like to deliver it. Conover told him about the middle of March, and said he would call again, and see when he (Petty) would have it. Conover then said, how about the payment of the money? Petty said, when would you like to have it? Conover said, on the 25th of March. Petty said, I can pay you all your money as soon as you get it delivered; all of it, just as lief do it as not. Conover replied he would like to have it so. Conover called again on Petty, about two weeks after this bargain, and asked him if he was ready for the corn, and which he would have first, the white or the yellow? He said, the white. In pursuance of which Conover did deliver the white corn, on Friday, the 15th day of March, viz. 272 bushels, at the mill. On Monday, the 18th March, Conover sent two loads of the yellow to the mill, viz. 68 bushels, which were sent back by Cornelius Petty, saying that they did not receive any more corn. On Friday, the day the white corn was delivered, Cornelius Petty had confessed judgment to his brother, John Petty, for a large amount, and the white corn delivered to Cornelius Petty on Friday was seized on Saturday under the *fi. fa.* on his brother's judgment, and seized under his orders by the sheriff, whereupon Conover brought this action against the sheriff and the plaintiff in execution to recover the value of the white corn delivered as aforesaid.

The only question raised by this case is, whether this contract was an entirety. If it was, then when Cornelius Petty refused to take the yellow corn, he himself repudiated the contract, and the white corn belonged, as before, to Conover; and as the defendants seized this white corn, or corn with which it had been so mixed by Cornelius Petty as that it could not be identified again, the defendants are responsible.

The question of entirety is one of intent of the parties to be gathered from its terms.

Was this one contract, or was it two? The defendants contend that there were two contracts, one to sell and deliver the white corn, and another the yellow. But the bargain of Conover with Petty was to sell all his corn that he had to

Kirkpatrick v. Cason.

sell, supposed to be about 600 bushels, and to be paid for when all was delivered, and not before. What was said about the corn, as white or yellow, was only to regulate the price, and to prevent any question as to the fairness of the proportions. If they had agreed to sell all the corn, both white and yellow, and nothing further said, it would have been the interest of Conover to smuggle in as much yellow corn as possible. To prevent any such questions, they agreed that as much of the whole amount of the corn as was white, should be paid for at 65 cents, and as much of the whole amount sold as was yellow, should be paid for at the rate of 63 cents. It manifestly was not the intention of the parties, if white corn should rise, and yellow corn fall, that Mr. Petty could take the white and reject the yellow. The object of Mr. Conover was to sell his whole crop, and of Mr. Petty to buy it.

There was no error in the court instructing the jury, that whether the corn was ground up or not made no difference, for two reasons: first, because the evidence shows that if this identical corn had been ground, there was enough left in the bin with which it had been mixed to answer for the 272 bushels; and in the second place, because if not there as corn, it was as meal, and the plaintiff could amend if necessary; because if the one reason assigned by the court was not good, the other undoubtedly was.

I think the judgment below should be affirmed.

BROWN and OGDEN, Justices, concurred

Judgment affirmed.

JOSEPH KIRKPATRICK v. WILLIAM R. CASON.

Where money raised by execution was brought into court for distribution, and claim made to it not only by the execution creditor, but by a landlord for the payment of rent, and also by attaching creditors, it was *held*—

1. That to authorize payment to the landlord, it must appear that rent

Kirkpatrick v. Cason.

was due him upon such a lease or contract as would give him a right to distrain.

2. That where a jury, from the circumstances, would be authorized in finding that the landlord had relinquished his right of distress, the court is justified in denying his claim to any part of the money.
3. That where the property levied on was of less value than \$200, and no inventory or appraisement was made by the sheriff, as directed by law, but the property was suffered to remain in the hands of the defendant, and the execution creditor himself stayed all further proceedings on the execution, the goods were, by consent of the plaintiff, in defendant's possession for his use and that of his family, and not as agent or bailiff of the sheriff, and the sheriff had no further lien on them, and could not lawfully sell them under the execution.

Certiorari to the Circuit Court of the county of Hudson.

Argued before HAINES and ELMER, Justices.

The opinion of the court was delivered by

ELMER, J. This *certiorari* brings up an order directing money, made by the sheriff upon an execution at the suit of the plaintiff against the defendant, and paid into court, to be paid over to certain attaching creditors. The money was claimed by the plaintiff; by the landlord for rent; and by the plaintiffs in certain attachments issued by a justice of the peace.

No case agreed upon by the parties, or stated by the court, is before us, nor have we any means of ascertaining precisely what questions of law were decided, but we are left to gather the facts as best we may, from loose *ex parte* affidavits not entitled to be read on the hearing in the court below or here, except by consent. Under these circumstances, every presumption as to the facts must be in favor of the correctness of the decision sought to be reversed. Although it is held that a *certiorari* is a proper mode of bringing before this court such an order as that in question, it is only for the purpose of reviewing the law involved, and not to determine the merits of the case upon the evidence. *Caldwell v. Fifield*, 4 Zab. 152.

It appears that the plaintiff issued his execution, and the levy was made September 14th, 1861, and on the same day

Kirkpatrick v. Cason.

the plaintiff stayed the proceedings until further orders. The goods and chattels levied on are those of a debtor, having a family residing in the state, of less value than two hundred dollars, and therefore exempt from sale, and no inventory or appraisement of them was made, as directed by the act of 1851. *Nix. Dig.* 249, § 13, 15.* So matters remained until the 5th day of March, 1862, on or before which day the defendant absconded, and several attachments were issued against him, by virtue of which the goods were seized by a constable inside the ferry gate, and about to go into the city of New York. After they were so seized, the agent of the landlord, who had been previously aware of the intention to remove, by virtue of a distress warrant, caused them, as the affidavit expresses it, to be "levied on" for rent alleged to be due. Then the sheriff asserted his claims, and as it would seem, by common acquiescence, sold the goods, and brought the money into court, the landlord giving him written notice to pay him his rent out of the proceeds. The defendant made a written waiver of his right of exemption, after the execution of the distress warrant in favor of the landlord, and subsequently made a like waiver in favor of the plaintiff.

As to the landlord, there is no evidence that rent was due him upon such a lease, or actual or implied contract, as entitled him to distrain. *Central Bank v. Peterson*, 4 Zab. 668. A landlord's warrant is not a process, but a mere power to do what the landlord himself might have done. The distress proved no right, nor did the fact that notice was given of the claim for rent. The affidavits produced state that the defendant occupied the landlord's house from May 1st, 1858, to March 5th, 1862, and that the sum of one hundred and eighty-one dollars and twenty cents of rent was due from defendant to the landlord upon the first day of March, and was due and unpaid at the removal of the goods, but whether the sum was due by a contract express or implied, or whether it was more or less than a year's rent, is not stated.

* *Rev.*, p. 391, §§ 10, 12.

Kirkpatrick v. Cason.

But I think the facts and circumstances disclosed by the evidence were such as would have justified a jury, had the question been submitted to one, in finding that the agent relinquished the landlord's claim to distrain, and not only permitted the goods to be taken from the premises, but would have allowed them to have been taken out of the state, had they not been attached. This being so, the court below had a right to draw the same conclusion, and we ought to assume that he did, and was thereby warranted in excluding the landlord's claim as abandoned. The exemption law enacts, that goods and chattels of the value of two hundred dollars shall be reserved for the use of the family, and shall not be liable to be seized or taken by virtue of any execution or civil process whatever, and requires the sheriff or other officer to inventory and appraise the goods; and if they exceed in value two hundred dollars, the debtor is to select such as he desires to have reserved, and if the appraisement shall not exceed two hundred dollars, the officer is to suffer the goods to remain in the possession of the defendant, for the use of himself and family. It appears in this case that the goods levied on did not amount in value to two hundred dollars, and no inventory and appraisement was made, because the plaintiff himself stayed all further proceedings on the execution. Under these circumstances, I think it must be held that the goods were suffered to remain in the defendant's possession, by consent of the plaintiff, for the use of himself and family, and not as the sheriff's bailiff or agent. The special property which the sheriff acquires by a levy was relinquished, so that he had no further lien on goods. This being so, they could not be taken and sold by him after his execution was returned. The defendant's waiver of his right to an exemption, was not made until long after it was returned, and could not therefore restore the lien, which had been relinquished during all the time it remained in force.

As to the objection, that the attaching creditors had not obtained judgment, it is a matter with which the other parties before the court have no concern. If they had no right to

State v. Elkinton.

follow the goods, they are not injured, and cannot interfere with the attachments. The order of the Circuit Court was in effect, to retain the money, until the claims of the attaching creditors should be duly ascertained, and was correct.

I am of opinion that the plaintiff in this *certiorari* has failed to show that the Circuit Court committed any error and that the order complained of must be affirmed.

Order of the Circuit Court affirmed.

THE STATE v. WILLIAM ELKINTON AND WILLIAM FERGUSON, JUN.

1. Attachments for not obeying a *mandamus* to open a road served on the overseer after he went out of office, and on the new overseer, refused.
 2. *Mandamus* to open a road ought to be, in the first instance, an alternative writ, and not peremptory, and how obtained.
 3. The writ should be delivered or shown to the person to whom it is directed.
 4. Overseer of the highway is bound to open and work the road without regard to the orders of the town meeting or the township committee.
-

A motion to quash the peremptory *mandamus* issued in this case, and a motion for attachments against the overseers, were made before Justices HAINES and ELMER, and were argued by S. A. Allen and A. Browning, for the relators, and by A. L. Eakin and P. D. Vroom, for the overseers.

The opinion of the court was delivered by

ELMER, J. The motion before us is to make absolute a rule to show cause why attachments should not issue against William Elkinton and William Ferguson, jun., for disobeying a writ of *mandamus* heretofore issued out of this court.

It appears, by the papers and depositions now produced and read, that at November term, 1862, a rule was obtained upon proof of notice and upon affidavits, now on file, that William Elkinton, one of the overseers of roads in the town-

State v. Elkinton.

ship of Upper Alloways Creek, county of Salem, show cause why a *mandamus* should not issue directing him to open and clear out a certain road, then recently laid out, the damages payable to the land owners having been paid, in obedience to a *mandamus* obtained for that purpose. At November term, this rule came on to be heard, and it was shown to have been duly served. Depositions, properly taken on notice, were read in support of the application. The overseer did not appear, and the court ordered that a peremptory writ of *mandamus* issue.

The writ, directed to William Elkinton, one of the overseers of the roads for the township of Upper Alloways Creek, in the county of Salem, was accordingly issued March tenth last, and was served on Elkinton, by delivering him a copy, on the thirteenth of that month. On the first of May, a copy of the same writ was served on William Ferguson, jun. The annual town meeting, it appears, was held on the tenth of March, when Ferguson was elected overseer of the roads in place of Elkinton. The latter assigns, as a reason why he did not obey the direction of the writ, that he went out of office before it was served on him. Ferguson assigns, as his reason, that it was not directed to him; and it appears that the town meeting and the town committee had directed that the road should not be opened.

On behalf of the defendants, it is now insisted that the attachments ought not to be issued, but that the writ itself ought to be quashed, on the ground that it was irregular to issue a peremptory *mandamus* before an alternative writ had been tried. We are, however, of opinion that although the peremptory writ may have been inadvertently allowed, yet as it was expressly ordered by the court, and was a writ which the court had power in its discretion to allow, the defendants had no right, and cannot be permitted to question its regularity after having an opportunity to be heard upon the rule to show cause. Had they disobeyed its commands without a reasonable excuse, we should have had no hesitation in holding them to a strict account.

State v. Elkinton.

But we think, as the case stands, the attachments must be denied, although we see no occasion to quash the writ. Elkinton, it appears, was superseded in his office on the day the writ was issued. It is urged that, by the 12th section of the act incorporating townships, *Nix. Dig.* 837,* the office of overseer of roads does not expire until another is legally chosen and qualified in his stead; and that in this case the successor had at least five days, that is, until the time expired for putting up notices of the election pursuant to the 17th section of the aforesaid act, to determine whether he would accept. Whatever may be the strict construction of this provision in the case of an overseer, who is not required to be sworn or to give bond, it appears that Ferguson did accept the office, and we think Elkinton could not after that be required to open the road, and is not liable to punishment for declining to act in the matter. As to Ferguson, the writ was not directed to him, but expressly, by name, to his predecessor, and there were no general words which made it applicable to him. And besides, this writ is not proved to have been shown to either of these defendants. An alternative *mandamus* should be delivered to the person who is required to obey it, or to return a sufficient cause for not doing so; the person serving it of course preserving a copy, so that, if needful, he may prove the service. In the case of a peremptory writ, or any other writ directed to an individual or to a corporation, and not to a sheriff or coroner, the proper course is to show the original to the person required to execute it; reading or explaining it, if necessary, and giving him a copy.

Having taken this occasion to examine our statute, *Nix. Dig.* 454,† and the approved practice in England and this country, we are satisfied that when a writ of *mandamus* is applied for, it should be after service of a notice or of a rule to show cause, and the production of full affidavits setting forth all the facts necessary to show that such a writ is proper. If then the court is satisfied to allow the writ, in all ordinary cases it should be in the alternative to do the

**Rev.*, p. 1195, § 12. †*Rev.*, p. 630.

State v. Elkinton.

thing required, or show cause why it is not done. In extraordinary cases, the writ may be peremptory in the first instance, as where a *mandamus* was allowed commanding a jailer to deliver the body of a deceased debtor to his executors. *Tapp. on Mand.* 407. In New York peremptory writs of *mandamus* were allowed, where the cases were fully argued on the rule to show cause, and there were no disputed facts, but both parties desired a decision upon the law. *Ex parte Jennings*, 6 *Wend.* 518; *Ex parte Rogers*, 7 *Wend.* 526. It was probably from a misapprehension or imperfect statement of these cases that the practice, said to have prevailed in this state, of allowing a peremptory *mandamus* originated. It was held by this court, in the case of *The State v. Holliday*, 3 *Halst.* 205, after full argument and consideration, that a *mandamus* may properly be issued to an overseer of roads, commanding him to work and open a new road; but it was an alternative writ, and we think this precedent ought to be adhered to.

The whole case being now before us, and having no doubt of our power to award the writ before allowed, or to authorize a new one, we think our true course is to order a rule to be entered refusing the motion for attachments without costs, and directing that an alternative writ of *mandamus* be now issued, directed, at the option of the relators, to William Ferguson, jun., overseer, &c., by name, or generally to the overseer of the roads of the proper district in the township and county aforesaid, commanding him to open, work, and make the road in question, to be particularly described in the writ, or that he show cause, at the next term of this court, why he hath not so done.

We take this course in full confidence that Mr. Ferguson really desires to do his duty, and will not neglect that duty without a good and sufficient reason. Having accepted the office of overseer, and being now before the court in his official capacity, he cannot be permitted to refuse to serve, unless he shall become incapable of doing so by some circumstance not within his own control. We cannot antici-

State v. Elkinton.

pate that he will fail to yield obedience to the law, and thus make it the duty of the court to inflict a punishment adequate to the offence, which may extend to actual imprisonment.

The laws of this state intrust the duty of laying out and vacating roads to officers specially elected and sworn for that object ; and they have made ample provisions for compelling a road duly laid out to be opened and worked, not only by rendering the overseer liable to penalties and to indictment for neglecting to do so, but by subjecting him to the direct action of this court, to compel him to perform his duty. Neither the inhabitants of the township, assembled in town meeting, nor the township committee, have any power to counsel or advise him in the matter, or to shield him from punishment. The town meeting may decide how much or whether any money shall be raised for the roads, and the township committee may apportion the road money among the districts as they shall deem advisable ; but the 42d section of the road act, *Nix. Dig.* 709, prescribes that if the overseer is not furnished with money to open, clear out, and work the roads in his division, he shall warn and call out the inhabitants to do the work ; and the 39th section prescribes, that if the inhabitants neglect and refuse, they shall be liable to penalties, which the overseer is required to sue for and expend in accomplishing the work.

Motion for attachment refused.

Rule ordered for alternative *mandamus*.

CITED in *State, ex rel. Kelly, v. Mayor &c., of Paterson*, 6 *Vroom* 199.

CASES DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW JERSEY,
AT NOVEMBER TERM, 1863.

WILLIAM A. BOWNE ADS. TITUS & SCUDDER.

1. A *ca. sa.* cannot be issued pending proceedings under the act to prevent fraudulent trusts and assignments.
2. The plaintiff is a competent witness on an application for a *ca. sa.*
3. It is not sufficient for the commissioner to decide that there was proof, to his satisfaction, that the defendant had rights or credits, moneys or effects, either in his own possession, or in the possession of some other persons; in the words of the act, he should specify by means of which of the several things mentioned, the fraud was committed.
4. A statement, that defendant made certain representations to plaintiffs, and that he had discovered recently they were false, is not sufficient evidence that the debt was fraudulently contracted.
5. The statements made by the defendant, when examined under the trustee act, cannot afterwards be sworn to as evidence of fraud to procure a *ca. sa.*

This was an application to set aside a *ca. sa.*, and was argued before HAINES and ELMER, Justices, by *P. D. Vroom*, for defendant, and *A. G. Ritchey* and *M. Beasley*, for plaintiffs.

ELMER, J. An execution against the goods and lands of the defendant having been returned unsatisfied, application was made to one of the justices of this court, pursuant to the act entitled, "an act to prevent fraudulent trusts and assignments," and an order obtained requiring the debtor to appear, and make discovery on oath concerning his property and

Bowne v. Titus & Seudder.

things in action before a commissioner. In obedience to this order he appeared, and was examined at great length. While these proceedings were still depending, and before the examination of the debtor had closed, the affidavit of one of the plaintiffs was presented to another commissioner, and he made an order that a writ of *capias ad satisfaciendum* be issued, which was done, and the defendant, having been arrested, entered into an arrangement with the plaintiffs, paid part of the money, and was discharged.

It is now moved to set aside this writ as irregularly issued.

The main object, if indeed it ought not now to be considered the only legitimate object, of an execution against the body in all ordinary cases of debt, is to compel the defendant to surrender his property of every description for the benefit of his creditors. Besides this remedy, the act before quoted authorizes, in certain cases, a compulsory examination of the debtor under oath, and if a proper case is made, an order forbidding the payment of debts due to him, the transfer of any money, property, or chose in action, and the appointment of a receiver to prosecute, receive, and sue for the property and thing in action of the debtor, or held in trust for him. This is only another mode of obtaining the same result, and in many cases is more certain and direct, and more beneficial to the creditor.

It is true, as urged for the plaintiffs, that the statutes do not in terms forbid the use of both remedies at the same time. But, in my opinion, the two proceedings are so incompatible, that this is necessarily implied. In the case of a *ca. sa.*, the defendant is to be arrested, and may remain in the custody of the sheriff, or may give a bond to take the benefit of the insolvent act, and certainly cannot then be required to appear before a commissioner. When an order is obtained for his examination, it is his duty to attend on the day appointed before the judge or commissioner, and from day to day until the examination is closed, and a refusal to do so will subject him to punishment for a contempt. Until he is discharged, he is a party attending in the course of a

Bowne v. Titus & Scudder.

legal proceeding by order of the court, and is privileged from arrest. I am clearly of opinion that a *ca. sa.* cannot be issued by the plaintiff pending the proceedings under the trustee act, and that this writ is irregular, and must for that reason be set aside.

Besides this objection, it is insisted that the proof made before the commissioner who made the order for the *ca. sa.* was not sufficient. He adjudged, as his order states, that proof was made to his satisfaction that the defendant had fraudulently contracted the debt, and also that he had property or rights in action which he fraudulently concealed, and that he had rights or credits, moneys or effects, either in his own possession, or in the possession of some other person or persons to his use, of the value of fifty dollars or over, which he unlawfully and fraudulently refused to apply in the payment of said judgment. The latter part of this order follows the words of the second particular of the second section of the act. *Nix. Dig.* 330.* It is defective in not stating by means of which of the several things mentioned, the commissioner was satisfied he had committed a fraud. An adjudication that a man has done either this or that, is not an adjudication that he has done anything. It is bad, for the same reason that an indictment charging several things in the alternative in the exact words of the statute, and a judgment thereon, are bad for uncertainty. Had the facts justified a decision, that the debtor had property and rights, credits, moneys, and effects, in his own possession, and in the possession of some other person or persons to his use, an adjudication in those words would have been good: but if all these particulars were not proved, the order should have specified which was.

The proof exhibited and filed, as required by the act, does not properly establish fraud in contracting the debt, or in any of the other particulars specified. It consisted of the affidavit of one of the plaintiffs, which, by virtue of the supplement to the act concerning witnesses, approved in 1850, was competent evidence for that purpose.

* *Rev.* p. 257, § 52.

Bowne v. Titus & Scudder.

That part of this affidavit designed to prove fraud in contracting the debt, sets forth in detail certain representations made to the said plaintiff, whereby he was induced to trust the defendant, and then adds, "that he has discovered recently that the said statement of the defendant was absolutely false," and that he had not done the things and had not the money he represented.

By the original act to abolish imprisonment for debt, passed in 1842, proof of certain facts was required to be made to authorize issuing the writ of *capais ad respondendum*, and also the writ of *capais ad satisfaciendum*. The proper construction of this act came before this court soon afterwards in the cases of *Wire v. Browning, Spencer* 364; *Hill v. Hunt, Ib.* 477; and *Kip v. Chamberlain, Ib.* 656. It was there held, that although the proceeding was of necessity *ex parte*, the act required proof by legal and competent evidence, and not the mere affidavit of the party; that the depositions must state facts, and not conclusions of law, as for instance, what the intent of the debtor was in disposing of his property, and that the facts sworn to must be such as, standing alone, would be left to a jury on an issue, as establishing fraud.

The act of 1846, now in force, allowed the parties' own affidavit upon an application for the *capais ad respondendum*, but re-enacted the provisions respecting the *ca. sa.* in the same words. Subsequent acts have authorized the court, or one of the judges thereof, in cases of orders for the first named writ, not only to examine in a summary way the legality and credibility of the original proof, but to take new testimony, and thereupon to determine whether the writ was properly or improperly issued. This authority is not extended to cases of orders for the *ca. sa.*, those being left to the relief that may be afforded by means of a *habeas corpus*, probably in consequence of the difficulty of interfering otherwise with an arrest on that writ, which in general satisfies the debt.

The absence of this power, while it affords no reason why creditors should not be aided in recovering their debts from

Bowne v. Titus & Seudder.

persons who, although able to pay, desire to defraud them by all legal proceedings, certainly adds force to the reasons, which in favor of the liberty of the citizen, so carefully guarded by our constitution and laws, require commissioners and judges to be careful, that the salutary provisions of the law are substantially and fully complied with.

The officer making the order for a *ca. sa.* is to decide upon the legality and credibility of the testimony produced, and as fraud is not to be presumed, but must be satisfactorily proved, he ought to be exceedingly careful, especially where only the evidence of the interested party is offered, to see that the facts stated are such as prove the fraud beyond a reasonable doubt.

Proof that the representations made to the plaintiff were, as stated, absolutely false, was in this case indispensable to show fraud in contracting the debt. It is plain from their nature, as set forth in the affidavit, that the witness had no personal knowledge of their truth or falsity. For him to swear, that he had discovered recently that they were absolutely false, was no more proof that they were false, than a man's swearing that the defendant had disposed of his property with intent to defraud his creditors, was proof that such was really his intention. If he had heard the defendant state other facts which had a tendency to prove his former statements to be false, or if he had otherwise become acquainted with other facts, in such a way as made him a competent witness of them, and not a mere retailer of hearsay, which had that tendency, he should have stated those facts, and how they came to his knowledge, and left the commissioner to draw the legal inference. If unable to state any such facts himself, he should have produced the testimony of those who could.

As to the fraud under the second particular, it is attempted to be shown by the plaintiff's oath that he was present at an examination before a commissioner under the act to prevent fraudulent trusts and assignments, and heard him make certain statements, which are detailed at length in the form of

Bowne v. Titus & Scudder.

question and answer; and it appears that these are copied from the unfinished examination, commenced before the commissioner upon the order procured by these plaintiffs, and by him reduced to writing. Had this examination been finished, so as to contain the full statements of the party examined, with all the explanations he was entitled to make, without which they ought not to have been used for any purpose, and had the proceedings under the judge's order been entirely closed, I am very clearly of opinion, we could not sanction such a use of these statements. No law authorizes an examination of the defendant, at the instance of the plaintiff, to show him guilty of a fraud that will subject him to imprisonment as a fraudulent debtor. The examination that was commenced, was for the sole purpose of reaching his property by direct proceedings for that specific object. To permit a compulsory examination of a defendant, authorized only for such purpose, to be used for another and wholly inconsistent purpose, seems to me inadmissible.

Inasmuch as it appears that the defendant, when arrested on the *ca. sa.*, arranged as well this debt as other indebtedness with the plaintiffs, and there is much reason to believe his conduct was far from correct, it is insisted, for the plaintiffs, that there is no adequate reason for setting aside a writ which is in fact executed. I think, however, we ought thus to express our disapprobation of a proceeding so irregular.

The case (*Ex parte case, Spencer 653,*) was different. There the defendant made use of his arrest under the *ca. sa.* as a ground of his application for the benefit of the insolvent laws, and was properly held to have waived the irregularity. In my opinion, the writ should be set aside with costs upon the terms that the defendant stipulates, to bring no action on account of any proceedings under it.

HAINES, J., concurred.

State v. Hoffman.

THE STATE, ABRAHAM APGAR, PROSECUTOR, v. HOFFMAN,
COLLECTOR OF THE TOWNSHIP OF BETHLEHEM.

1. A farm lying in two townships, upon which there was a dwelling house situate in each of said townships, one of which was occupied by the owner, and the other by his son, who tilled the farm upon shares, *held* to be all occupied by the owner, and to be rightfully taxed to him in the township wherein he resided.
2. It seems that the act to make taxes a lien on real estate, *Nix. Dig.* 853, § 33, is only directory, and is indispensable only for the purpose of authorizing a sale of the land when the owner is a non-resident.

On *certiorari*. In matter of assessment.

For the prosecutor, *G. A. Allen*.

For the defendant, *B. Van Syckel*.

The opinion of the court was delivered by

ELMER, J. The prosecutor owns a farm in the county of Hunterdon, which is divided by the line between the townships of Bethlehem and Lebanon, his residence being on that part which lies in the latter township. His son resides in the farm buildings on that part within the township of Bethlehem, and as the case agreed upon states, farms the whole premises on shares, occupies the farm buildings, having the entire control and management of the premises, the father pasturing two cows and two horses, picking apples from the orchard, and assisting at times in working thereon, but only at his pleasure. The prosecutor was assessed, in the year 1861, for the value of the whole premises by the assessor of the township of Bethlehem, and it is the object of this *certiorari* to test the legality of that assessment. It is understood that he was also assessed for the same premises by the assessor of Lebanon.

It is provided, by the sixth section of the tax law of 1854, 3 *Nix. Dig.* 851, § 63,* that every person shall be assessed in the township or ward where he resides when the assessment

**Rev.*, p. 1132, § 65.

State v. Hoffman.

is made, for all lands then owned by him within said township or ward, either occupied by him or wholly unoccupied, and when the line between two townships or wards divides a farm or lot, the same shall be taxed, if occupied, in the township or ward where the occupant resides.

The first section of a subsequent act, of the same year, to make taxes a lien on real estate, 3 *Nix. Dig.* 853, § 77,* requires the assessor to assess all lands and real estate in the names of the owners thereof respectively, and to designate the same by some short description, such as will be sufficient to ascertain the location and extent thereof. The phrase unoccupied land, as used in the act of 1854, designated, I suppose, the same kind of land as was described in the previous tax law as unimproved or untenanted land, by which was, no doubt, meant land having no visible occupant or possessor. The prosecutor's farm was certainly occupied land, and I see no reason to doubt that he was himself, both the owner and the occupant of all but the buildings actually in the occupation of his son.

Land let on shares remains in the possession of the landlord. *Tayl. Landlord and Tenant*, § 24. The tenant being in that case a mere farmer, paid for his labor by a share of the produce. The burthen of proof, that he was not the occupant, was on the prosecutor, the presumption being that the assessment is correct. It is stated, in the agreed case, that his son had the entire control and management of the premises; but it is not stated that he possessed or occupied them, and I think that the inference from all the facts stated is that he did not, but that the prosecutor did.

It is not necessary to decide in this case, what would have been the consequence, if the son had been in fact the tenant and occupant of the farm.

If the first section of the act to make taxes a lien on real estate is to be construed as peremptory in all cases, and as repealing the previous act, which authorized land to be assessed to the tenant, 3 *Nix. Dig.* 846, § 33, it must have been assessed to the prosecutor, as owner thereof, partly in

**Rev.*, p. 1163, § 114.

Slack v. Reeder.

the one township, and partly in the other. Or if that section is only directory, and is indispensable only for the purpose of authorizing a sale where the owner is a non-resident, as I incline to think, it might have been assessed to the tenant in each township. The whole farm could not have been assessed to either in the township where he resided, because that is authorized only in the case where the owner is also the occupant. As in this case the prosecutor, who resides in Lebanon, was the owner and occupant, it follows that the assessment in Bethlehem was unauthorized, and must be set aside.

Assessment set aside.

CITED in *State v. Jewell*, 5 *Vroom* 260.

PHILIP F. SLACK v. JOSEPH REEDER.

If a plaintiff, who becomes entitled to a judgment by default in vacation, omits to enter the same until after the term next after such default, he cannot have such judgment until he has given thirty days' notice to the defendant.

G. S. Cannon, for the defendant, moved to set aside the judgment in this case, as having been improvidently entered. *A. Dutcher*, for plaintiff, *contra*. Before ELMER and VAN DYKE, Justices.

The opinion of the court was delivered by

ELMER, J. The summons in this case was returnable in May, 1862, and a declaration filed within thirty days thereafter. No further proceedings were taken until the present term of the court, when a judgment was entered by default, and an assessment filed, followed by a final judgment and execution. This proceeding was claimed to be in pursuance of the second section of the act to facilitate the administration of justice, *Nix. Dig.* 633, § 110.* We think this judgment was irregularly entered, and must be set aside, and we find, on consultation with the other judges, that they concur in this opinion. There is nothing in the statute which

**Rev.*, p. 877, § 144.

Corlies v. Fleming.

interferes with the full operation of section 90 of the rules of this court. That section requires that, "if any party would take advantage of the failure of the adverse party in not filing his declaration, plea, or other pleading, within the time prescribed by law, he shall take such advantage at the term next after such failure." The statute authorizes an entry of the judgment in term, or in vacation, so that if after the default, a judgment shall not have been entered before the term, it may be then entered by the attorney without the order of the court, or by a special order therefor, as before the statute. But if the plaintiff fails to do either, he comes within the operation of the rule, and cannot afterwards enter his judgment under the statute or by order of the court on motion, unless he has given thirty days' notice to the adverse party, as prescribed by the rule.

Judgment set aside.

CITED in *Dock v. Elizabethtown Manufacturing Co.*, 5 Vroom 314.

GEORGE A. CORLIES v. CHARLES P. FLEMING AND JOHN P. CORLIES.

If one of three makers of a joint and several promissory note die, the contract of the surviving makers remains joint as well as several, and payment of interest within six years by one of the surviving makers will take the case out of the statute of limitations.

In case certified from Monmouth Circuit Court.

This action was brought on a joint and several promissory note, given by the defendants and one Benjamin Farrington, dated September 4th, 1850, payable one year after date, to John W. Stout, or order, and by him endorsed to the plaintiff. Farrington died before the 1st of February, 1855, and the suit was commenced on the 11th of July, 1861. The interest was paid every year, by Fleming, to the plaintiff, to the year 1860 inclusive.

The statute of limitations was pleaded.

Corlies v. Fleming.

BROWN, J. Notwithstanding the death of Farrington, the contract of the surviving promisers remains joint as well as several. The death severed the contract only as to the representatives of the deceased. The liability of the survivors remains unchanged. The payments, by Fleming, of interest up to February, 1855, were made during the joint liability of all the drawers of the note, and after that time during the joint liability of himself and his co-defendant.

The question, therefore, raised by the plea of the statute of limitations, is whether payment by one of the joint debtors, without the knowledge and consent of the other, relieves the claim from the bar of the statute.

As to the party making the payment, it is not questioned but that it is such evidence of the subsistence of the debt, and of willingness to pay it, as to justify the inference of a promise to do so. The contention is, that it does not bind the co-debtor, because he did not make or assent to the payment; and further, because there is no agency, express or implied, among joint debtors (other than partners) authorizing one to bind the other by a new promise, express or implied. If this were an original question, I am not at all sure that the proposition would not be held good law. It might fairly be urged that the implied agency of one to pay the debt, or a part of it, for the other, extended only to the fulfilling of their obligation, and not to the creation of a new one, in place of that barred by the statute.

But irrespective of the question, whether this note could at any time be considered barred, the payments having been made each year, to take this ground *now* would cause much difficulty and injustice. The law has always, I believe, been held otherwise in this state. The people have acted and are now acting upon the belief that one joint debtor may by promising, or by payment, from which a promise is inferred, preserve a claim from the statute bar, or if barred, revive it against all the debtors. Upon the rule contended for by the defendants, no doubt a multitude of sureties upon joint and several notes held in this state, and now considered good se-

State v. Clothier.

curities for the money, as well by the debtors as the creditors, would be discharged. This ought not to be done by the courts, nor indeed by the legislature. A new rule, if required, should have only a prospective operation.

That the law has been so held in New Jersey appears by the case of *Disborough v. Bidleman*, considered in the Supreme Court, and reported in *Spencer* 275—277, and again in the Court of Errors, reported in 1 *Zab.* 677.

The memory of every lawyer will probably suggest circuit rulings sustaining the statement of Carpenter, J., in the same case, 1 *Zab.* 680, that "it is a rule which has been frequently recognized as settled law in this state, that payment by one is payment for all, the one acting virtually as agent for the rest, and will take the case out of the statute."

As this view is decisive of the case presented by the certificate, it is not necessary to examine the other question. The circuit should be advised that judgment be entered for plaintiff.

OGDEN, J., concurred.

THE STATE, FENNIMORE, PROSECUTOR, v. CLOTHIER, COLLECTOR OF TAXES.

1. A tax voted by a special town meeting to pay bounties to volunteers, unauthorized by any special law, where the notice of the meeting did not specify the object, and no specific sum, nor any certain means of ascertaining the proper amount were determined, *held* to be illegal.
2. The town clerk's oath, that a certified copy of a resolution of the town meeting was copied from the town book, *held* to be sufficient proof.
3. A tax illegally assessed will be reversed and set aside when regularly before the court on a *certiorari*, although it has been collected by warrant.

Argued before ELMER and VAN DYKE, Justices, by P. D. Vroom, for the prosecutor, and M. Beasley, for defendant.

State v. Clothier.

The opinion of the court was delivered by

ELMER, J. The tax objected to in this case was assessed by virtue of a resolution, passed by a special town meeting of the inhabitants of the township of Springfield, county of Burlington, held in August, 1862, which directed a sufficient amount of money to be raised by taxation to pay certain bounties to volunteers, without specifying how much. The assessor proves that twelve hundred dollars was the amount raised for this purpose.

If the facts have been sufficiently shown, 't is not insisted by the counsel for the township that this tax was legally assessed. It cannot be doubted, I think, that it was illegal, for three reasons—first, because no general or special law authorized the town meeting to raise any money for the purpose specified; second, because no specific sum, nor any certain mode of ascertaining the sum intended, was provided for; third, because the notice of the special town meeting, set up by the clerk, did not mention the object or purpose of the meeting, as required by the statute. *Nix. Dig.* 876, § 15.*

It is urged, however, that the resolution, produced as a copy of that adopted by the special town meeting, is not properly proved. The clerk of the township certifies that it is a true copy, and swears that it is a copy from the town book, and this is equivalent to proof of what is termed a sworn copy. It was not necessary, nor indeed proper, to produce the book itself. I do not perceive, however, that this question is of any importance. The assessor proves that the amount ordered to be raised by the special town meeting was twelve hundred dollars, and that the sum thus ordered, and not otherwise authorized, was added to the amounts regularly authorized to be raised. If no formal resolution to do this was adopted or recorded, so much the worse.

But it was also insisted that, admitting the tax to have been illegally assessed, it was a *tort* in the assessor for which he is liable; and that inasmuch as the tax has been levied by distress and sale of the prosecutor's goods, and no direct action of the court can restore the money, we ought not to

* *Rev.*, p. 1196, § 15.

State v. Clothier.

interfere by virtue of a *certiorari*. I do not think it follows that the *certiorari* is not properly brought, because the prosecutor has his remedy against all persons concerned in assessing or collecting this tax. The proceeding to determine the legality of a tax assessment, by means of a *certiorari* directed to the officer who has the possession and enforcement of the duplicate containing it, seems to be peculiar to this state. But the practice is well established, has been found to be a safe and effectual remedy, and has been recognized by legislative enactments. Nor can I admit, that the court cannot enforce the restoration of what has been wrongfully collected. But it is not necessary now to affirm or deny this power. We cannot anticipate that the township authorities will hesitate to restore money, which shall be judicially determined to have been illegally obtained, and leave their officers to pay the penalty.

It appears that the prosecutor appealed from the tax, and that the three commissioners of appeal actually signed a certificate reducing it, but it being doubtful whether they had been duly qualified to act, and whether the certificate had been properly signed, the township officers disregarded it, and proceeded to collect the sum originally assessed. That so much as was taken off by the commissioners was illegal, is now clearly established, and we are thus relieved from the necessity of inquiring into the regularity of the certificate.

Some question was made, on behalf of the prosecutor, whether this case comes within the statute. *Nix. Dig.* 853, § 74.* I see no reason to doubt that it does. The rate is shown to be higher and greater than that ordered by any resolution authorized by the law. It follows that, instead of setting aside the whole tax, the amount must be reduced by deducting the amount added by virtue of the illegal resolution, as to which the tax must be reversed, and as to the other part affirmed. The precise amount to be deducted not being shown, unless ascertained by the agreement of the parties, a commissioner will be appointed to report the proper sum.

*Rev., p. 1172, § 147.

Dow v. Haley.

FOLKERT DOW v. HALEY AND HALEY.

To support an action upon a physician's bill, the plaintiff must prove that he has been duly licensed or has a diploma, (as prescribed by the act incorporating medical societies.)

This was a *certiorari* to the Somerset Pleas, bringing up a judgment of that court upon an appeal.

Argued before Justices HAINES and ELMER, by *I. N. Dilts*, for the plaintiff, and by *Schenck*, for defendants.

ELMER, J. The present defendants, who were the plaintiffs in the justice's court and upon the appeal, sued the plaintiffs for a sum of money alleged to be due them for visits and medicines, made and prescribed as doctors of physic.

Upon the trial, one of the plaintiffs testified that he practiced medicine with his father, the other plaintiff, and attended Mr. Dow's family, in connection with his father, before and during the time of the bill. No other evidence being produced that these plaintiffs, or either of them, were entitled to practice physic or surgery, in pursuance of the provisions of the act to incorporate medical societies, and the supplements thereto, *Nix. Dig.* 491,* it was insisted then, as it is now, that they were not entitled to recover.

For the defendant, it is insisted that proof of their having acted as physicians, was sufficient *prima facie* evidence that they were in fact duly authorized. The case of *Moses v. Thoruton*, 8 *T. R.* 307, is relied on, but it does not support this proposition.

Physicians do not occupy the position of attorneys, sheriffs, and other public officers, and are not enumerated among those whose character is shown by proof, that they have notoriously acted as such. 1 *Greenl. Ec.*, § 83. It may be law, as is stated doubtfully, 3 *Stark. Ec.* 373, 1 *Saund. Pl. and Ec.* 357, that mere proof that he has acted as a physician will substantiate a general averment in a declaration

* By an act entitled "an act to reorganize the Medical Society of New Jersey," (*Rev.*, p. 675,) the act (*Nix. Dig.* 491) was repealed.

Dow v. Haley.

for slander ; but if it be, no such rule can be safely applied to actions brought for services, in face of a statute expressly denying such an action, to any person who practices without a license. The object of the act regulating the practice of physic in this state is declared to be to prevent irregular pretenders from imposing on the ignorance and credulity of their fellow citizens. The 12th section of the original act imposes a penalty of twenty-five dollars on every unlicensed practitioner for every prescription, and expressly declares that he shall be forever disqualified from collecting any debt incurred by such practice. It is a general rule, that in suits for a penalty or in a criminal prosecution, negative averments, peculiarly within the knowledge of the party, will be taken to be true, unless proved by that party ; and this rule has been properly applied to medical practitioners. *Apoth. Co. v. Beatty, Ryan & M.* 159 ; *Sheldon v. Clark*, 1 *Johns. R.* 513. In *Spaulding v. Alford*, 1 *Pick.* 33, it was held that to support an action by a physician, proof was necessary that he was duly licensed.

The principal reliance of the defendant's counsel seemed to be on the supplement, approved March 17th, 1854, *Nix. Dig.* 495.* This provides that it shall be lawful for all persons of good moral character, who have a diploma of a particular description, to practice physic and surgery, after depositing a copy of such diploma with the clerk of the county ; and until such copy shall be so deposited, those practitioners who shall neglect the same shall be liable to the penalty of the act to which it is a supplement. Inasmuch as the disqualification to sue, specified in the twelfth section of the original act, is here omitted, it is urged that it is repealed, and is no longer in force. I cannot concur in this conclusion. The thirteenth section of the original act requires a copy of the license to be deposited in like manner under the same penalty, omitting the disqualification ; and it is perhaps the true construction of that section and of the supplement that the omission to deposit the diploma incurs only the penalty, and does not prevent a suit, as seems to have been held in the case of *Finch v. Gregory's Ex'rs*, 25 *Wend.* 469.

*This supplement also repealed by the act, *Rev.*, p. 675.

State v. Brooks.

But to entitle a practitioner to the benefits of the supplement, he must show himself to be such person as is therein described. Unless he is such person, he remains subject to the disqualification prescribed in the 12th section, as against all persons who shall practice, contrary to the provisions of the act of which it is a part.

I am therefore of opinion that the judgment of the Common Pleas must be reversed.

HAINES, J., concurred.

Judgment reversed.

CITED in *Vaughn v. Hawkinson's Adm'r*, 6 Vroom 81.

THE STATE v. CHARLES BROOKS.

1. On a trial for murder, it is not a sufficient objection to the panel of jurors served upon the prisoner, that it is not according to the statute. The particular objection should be pointed out.
2. A panel headed "petit jury, April term, 1863," containing the names of forty-eight jurors, and the names of the townships where they reside abbreviated, is sufficient, if served on the prisoner at the same time with the copy of the indictment, if the abbreviations are such as clearly to indicate the residences of the jurors. A cross over the name of one of the jurors will not vitiate the panel, if it leaves the name of such juror plainly legible.
3. A murder was committed on the 8th March, 1863. On the 30th of March, the prisoner confessed to G. H. and to the sheriff, that he did it. On the 2d of April, the defendant confessed the whole thing in writing before the justice. On the 15th April, he confessed the fact again to T. M., and on the 20th of April, again to T. R. A verdict of guilty being rendered, the court suspended judgment, and certified the case to this court for their advisory opinion, as to whether the Oyer should grant a new trial, on account of illegal admission of the said confessions.
4. *Held*, that even if the original confession were illegally admitted in evidence, because obtained by undue promises and threats, yet that the court would decline to advise a new trial, unless the subsequent confessions were specially objected to in the Oyer, on account of their having been obtained under the influence of the original promises or threats. The case not having any such special objections, this court

State v. Brooks.

will presume that the Oyer were satisfied, as a question of fact that the subsequent confessions were not produced by the influence of the original promises or threats. And upon a review of the facts, this court, seeing no reason to doubt the correctness of the admission of such subsequent confessions, will not advise a new trial.

On trial for murder at the Burlington Oyer and Terminer. Several question were reserved for consideration at bar, and were argued by

For the State, *M. Hutchinson.*

For the defendant, *J. C. Ten Eyck.*

The opinion of the court was delivered by

VREDENBURGH, J. The defendant was convicted, at the last Burlington Oyer, for the murder, in the first degree, of one Job Brooks. Sentence was suspended for the purpose of taking the advisory opinion of this court, whether there should be a new trial, on the following grounds:

First. Because of an alleged defect in the list of jurors served upon the prisoner.

Secondly. Because of alleged illegal admission of divers confessions of the defendant.

Waiving any question as to the regularity of the proceedings here, we will consider—

First, as to the list of jurors. This list is on a half sheet of foolscap paper, and has on it only the following words: "Petit jury, April term, 1863.—Daniel F. Gibbs, Pemb.," followed by forty-seven other names, with like abbreviations for the names of the township. The name of Joseph Taylor, one of the jurors, is crossed thus: "Joph ✕ Taylor."

It is admitted that this list was served on the prisoner, at the same time with the copy of the indictment, within the proper time. The cause was moved on the 28th of April, 1863, whereupon, on behalf of the defendant, it was objected that the list of jurors was not in accordance with the statute.

The statute, *Nix. Dig.* 197, § 1,* enacts, that in murder, the defendant shall have a copy of the indictment and a list

**Rev.*, p. 279, § 66.

State v. Brooks.

of the jury, mentioning the place of abode of such jurors, two entire days, at least, before the trial, and which jury, by the 8th section of the same act, is to be selected from the general panel drawn to attend at that term; and unless he has had such panel delivered to him, he shall not be put upon his trial without his consent in open court.

It is first objected to this panel, that it does not show, upon its face, in what county it is, nor in what court, nor in what case. But it was served at the same time with the copy of the indictment, in which all these things appear. There was no reason for repeating them upon what is only, by the statute, intended to be a mere list of the jury. In England, even for high treason, where the sheriff, by virtue of a general precept before a trial, or a commission of general jail delivery, returns a general panel, the same is entitled generally, "names of jurors to try for our Lord the king," without naming any of the prisoners. 1 *Chitty's Cr. Law*. 517.

It is next objected to this panel, that it does not appear that it was selected from the general panel, nor by whom. But it does appear that it was the petit jury for April term, 1863, from which we are to presume that no more than these forty-eight men were returned to that term as petit jurors, in which case there could be no selection. All that the sheriff or anybody else could do, was precisely what he has done, serve a copy of the whole list, and it is a matter not material by whom it was done. All the statute requires is that it shall be delivered by the sheriff, or other proper officer, to the prisoner, which it is admitted was done in the present case. It is next objected, that the statute requires forty-eight names on the panel, and it is alleged that there are only forty-seven on this, the name of Joseph Taylor having a cross over it. Why the cross was put there we are not informed. But it has not erased the name. The name is there yet, quite as legible as if the cross was not there. No objection was made at the trial. If there had been, it might have been explained. But whether objected to or not, we cannot say, against the evidence of our eyesight, that the

State v. Brooks.

name is not there. It is next objected, that the statute requires that the panel should state the residences of the jurors. But, in the first place, no such objection was taken at the trial, and so could not have injured the defendant on the trial of the merits, and therefore by our statute, *Nix. Dig.* 205, paragraph 45, § 2,* is not ground for reversal even on writ of error. Next, the panel does state the names of the townships by abbreviations. The township residence of each juror is stated in an abbreviated form. No one could for a moment hesitate to know, from these abbreviations, the residences of the jurors as perfectly as if the name of the township was written in full. We think this panel does state the residences of the jurors within the meaning of the act. In the case of *The King v. Stone*, 6 Term R. 531, in a trial for treason, the objection was taken, that one of the jurors was ill described, his place of abode being stated to be Grafton street, there being several of that name. The objection was overruled. The description in this case is more specific than that. Even if these objections had been here specifically upon writ of error, we see no reason to reverse therefor.

The second question reserved by the Oyer is, whether there should be a new trial, because of the admission of certain confessions of the defendant.

The murder was committed on the evening of the 8th of March, 1863.

The first confessions of the defendant were made to George Hulme, on the morning of the 30th of March, at Salem, Ohio. Mr. Hulme says, that with a constable of Ohio and another person, on the morning of the 30th of March, 1863, he arrested the defendant near Salem aforesaid, and immediately put handcuffs on him. The defendant asked them what they wanted him for. Hulme told him, to go back to Jersey. Hulme, the defendant, and the constable then got in a carriage to return to Salem. As they were riding along, Mr. Hulme told the defendant that he was suspected of having something to do with the murder of his father. Defend-

*Rev., p. 284, § 89.

State v. Brooks.

ant replied, he had had a great deal of trouble. Hulme remarked to him it was very important, if he knew anything about it, to tell it; that if he did know anything about it, the only safe course for him was to tell the truth. The truth was the only thing that would carry him through, and give him friends here and in the world to come; that lies would not. Hulme says: I said everything I could to get him to tell the truth, and all he knew about it. I used no threats or promises. I told him to tell the truth, and I would do all I could for him. I kept telling him it was believed there were others that knew as much as he did, if not more. Mr. Hulme then proceeds further, and says; "Just before we got into Salem, I remarked, Charley, if you have anything to say, say it before we get into Salem." He hesitated a moment, and then says: Mr. Hulme, I'll tell you all about it. "I'm the boy that done it; I struck the first blow; I struck him but once, but Tim finished him." The defendant then went on, and gave a detail of the transaction, which it is needless to recapitulate now.

The defendant made substantially the same statement to sheriff Leeds, on the same day, while in the cars returning to New Jersey. On the 2d of April, 1863, the defendant's examination was taken in writing before Ellsworth Holman, a justice of the peace, and to which he signed his name. The justice previously said to him: Charles, you are charged with the murder of your father; if you have anything to say in relation to the murder, I will hear it. The justice also said to him, that he wished him to understand, that he was not required to state what he knew respecting it, especially if it would criminate himself. The justice says: I cautioned him on that point, lest it should come against him at some future time. I also said, what he might say must be voluntary, of his own free will. I think George Hulme was present during the whole examination. In this written examination, the defendant makes the same confessions, in substance, that he had previously to Mr. Hulme and the sheriff.

State v. Brooks.

On the 15th of April, 1863, the defendant told Thomas McNevinney the same story that he had done to Hulme, confessing that he did it, and stating divers circumstances attending the transaction.

On the 20th of April, 1863, the defendant told one Thomas Runos that he had done the deed himself. Here the defendant has, as often as five times, on as many different occasions, to as many different people, confessed that he committed this murder. They are *prima facie* admissible, unless the defence shows something to make them inadmissible.

It is contended here, on the part of the defence, that they are all inadmissible, on account of having been procured by undue promises and threats.

It is not pretended that any undue promises or threats, or any promises or threats, or undue influences whatever, were used at the time of the confessions before the justice, to McNevinney or to Runos. But it is contended that Mr. Hulme, to whom the first confession was made, did promise him to befriend him if he would tell the truth, and that such confession was untruly made in consequence of such promise; and that the same promise induced him to persevere in the same statements subsequently before the justice and McNevinney and Runos.

I shall first examine whether the confessions before the justice and to McNevinney and Runos were properly admitted by the court. Sitting here to give an advisory opinion to the Oyer, not upon specific questions of law, but as to the propriety of a new trial, can we say that the court below should have overruled this testimony?

On the trial, the written confession and the one to McNevinney were objected to, but the case does not show upon what ground they were objected to. They were *prima facie* admissible, and to make the objection a legal one, it should have been, that the previous confessions were obtained by undue promises or threats, and that the confessions objected to were obtained by the continuing influence upon the prisoner's mind of such threats or promises. If

State v. Brooks.

such an objection had been taken, the state might have shown the contrary thereof; a general objection was not sufficient. The reason of the objection should have been specially shown. But suppose this objection had been specially made, what was the question, in this regard, before the Oyer? It was not whether the confessions to Hulme and the sheriff were obtained by undue promises, but whether the facts in evidence overcame the presumption that the confessions to the justice, McNevinney, and Runos were likewise made, by the continuing influence upon the defendant's mind of those promises. These were questions of fact for the Oyer to settle, and they did settle them. They decided, if the question was raised at all, that in their opinion the confessions to the justice and to McNevinney and Runos were not obtained by the continuing operation upon the defendant's mind, of the supposed promises by Hulme. Can we say that the Oyer was wrong in that decision?

It does not appear, by the case, that this question was raised before the Oyer, and if it was not, the evidence was clearly admissible. But if this question was raised before the Oyer, it was decided by that court that these confessions to the justice, to McNevinney, and Runos were not produced by the supposed inducements held out by Mr. Hulme. Can we say that the Oyer was wrong in this decision?

In the case of *The State v. Guild*, 5 *Halst.* 180, the Oyer overruled the original confessions, upon the ground that they had been induced by promises, but let in subsequent confessions, upon the ground that the Oyer concluded, from the circumstances, that the hopes induced by the original promises were dispelled. In the charge to that jury, Justice Drake said: "Although an original confession may have been obtained by improper means, subsequent confessions of the same, or of like facts, may be admitted, if the court believes, from the length of time intervening, from proper warning of the consequences of confessions, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confessions were obtained, were entirely dispelled."

State v. Brooks.

The question was reviewed, and the proceedings and charge of Justice Drake received the entire approval of this court. It was thus a question of fact, whether in the case before us, the confessions to the justice, to McNevinny, and to Runos were induced by the promises made by Hulme to be settled by the Oyer. We could not reverse their decisions upon this point without also constituting ourselves a tribunal to decide facts, and we are not in as favorable position to decide rightly as the Oyer. But we do not see in the present case the slightest ground to doubt the correctness of the result to which the Oyer arrived, even if the objection had been specially taken. Take the case of the written confession to the justice. It took place on the 2d of April, three days after the confession to Mr. Hulme. He was cautioned by the justice that he was not required to state what he knew respecting the murder, especially if it would criminate himself, lest it should come against him at some future time, and what he should say must be voluntary. No threats or promises whatever were made use of. Now why should the Oyer conclude, that what the defendant should then say, would be the result of what Hulme had said to him three days before? He was told that he was not required to state anything, and what he should state must be voluntary. He however saw fit to go on, and make his written confession.

In what way does the confession to the justice differ from a plea of guilty before the Oyer? If this confession should be refused, for the same reason the Oyer should have refused a plea of guilty, upon the ground, that having once been induced to accuse himself, the plea of guilty is presumed to be made under the same motives.

I see no ground whatever to conclude that this entire written confession was induced by any promise by Hulme or the sheriff. These kinds of confessions are continually received; they were in the case, before referred to, of Guild. So also in *Williams' case*, 1 *City Hall Recorder* 149; and of others, 4 *City Hall Recorder* 138,* and of *Mills*, 5 *City Hall Recorder* 78. This written confession contains many details showing

* Case of *Bevorhan et al.*

State v. Brooks.

internal evidence of its truth,—details proved by other witnesses.

But again, the defendant confessed to McNevinny, on the 15th April, seventeen days after his confession to Hulme. What reason had the Oyer to believe that this was induced by what he had been told by Hulme? I see nothing in the evidence which should have induced the Oyer to believe that this was the consequence of what Hulme had said to him, and so with regard to the confession to Runos so late as the 20th of April.

As to the evidence of Runos, no objection to its admission was made at all. The confession to him was full and complete that he did the deed. Upon the confessions to Runos alone the court would be unwilling to advise a new trial.

It appears to me that, if the Oyer were bound to reject these confessions because of the conversation between Hulme and the defendant on the 30th of March, the Oyer should have rejected, for the same reason, his plea of guilty, if he had made one in open court.

It has been a question whether the decision of the admissibility of these confessions was one for the court or the jury. But it is now settled that it is one for the court. The court weighs the evidence upon this point, and admits or rejects the evidence in its discretion. What weight the jury are to give it, is another matter. This makes it necessary to decide whether the Oyer should have rejected the confessions to the sheriff and Mr. Hulme. The written confessions are better evidence than the verbal ones to Hulme, and they being admissible, it is a matter of indifference whether those to Hulme and the sheriff are in evidence or not. The evidence of the written confession and to McNevinny and Runos must have produced a conviction whether the confessions to Hulme were in evidence or not.

The question being one of discretion, this court sees no reason to recommend a new trial, when it is apparent that it could only result, as this one has, in a verdict of guilty.

The court decline to advise the Oyer to give a new trial.

State v. Council of Elizabeth.

THE STATE, LUTHER T. HAND AND OTHERS, PROSECUTORS,
v. THE CITY COUNCIL OF THE CITY OF ELIZABETH.

1. On petition to a municipal authority, asking that a street may be paved, the city council may regulate the surface of the street, by filling and excavating preparatory to paving it, and include, as a necessary incident, the costs of such grading in the assessment for the costs of the paving.
2. Assessments for the paving of intersections, under the charter of the city of Elizabeth, must be confined to the line of the street on which the improvement is applied for.
3. It is not necessary, in order to give the city council of Elizabeth jurisdiction, that it should appear by their minutes that they had appointed a day to hear persons objecting to the improvement, or interested therein; it is sufficient if such notice of hearing, drawn in compliance with the provision of the charter by order of the city council, be regularly advertised by the city clerk.

Certiorari to set aside assessment for paving a street under authority of the city council of the city of Elizabeth.

For plaintiff in *certiorari*, *J. Alward*.

For defendant, *R. S. Green*.

The opinion of the court was delivered by

OGDEN, J. It appears, by the papers sent to this court, in the return of the city clerk to a writ of *certiorari*, directed to the city council of the city of Elizabeth, that upon an application in writing to the council, made by Luther T. Hand and others, in May, 1859, proceedings were had in the council, whereby First street, at Elizabeth Port, from Broadway to Elizabeth avenue, was paved under the superintendence of the street committee and street commissioner.

After the execution of the work, and an assessment of the costs and expenses thereof, made by commissioners, and laid upon the owners of the land and real estate upon the street between the designated points, several of the petitioners and others interested applied for and obtained the *certiorari*,

State v. Council of Elizabeth.

which removed into this court all the proceedings had by the council in the matter of paving said street and making the assessment.

Fifteen special reasons were assigned why the assessments should be set aside, but the arguments were confined principally to three objections.

The petitioners asked that the street might be *paved*, and it appears that the estimate made of the costs of the work included the expenses of *grading* the street preparatory to paving. It is clear that the paving could not have been properly done without so regulating the surface of the street, by filling and excavating, as to form a proper bed for putting down the stones. The expenditure made in the grading was a necessary incident to the paving, and it was properly assessed as a part of the costs of the work petitioned for. That objection to the proceeding cannot prevail.

Another untenable objection was, that all the costs were assessed upon the property holders on First street, whereas it was contended that a proportion of the expenses for paving the intersections should either have been placed upon owners of lots on the intersecting streets, or have been assumed by the city.

The application for paving First street could not have been complied with by leaving the half of each cross-street without pavement, and as the property holders on those streets did *not apply* for the improvement, the council had no power to make them contribute to the expense of doing it.

The first reason assigned, and the one on which the argument was chiefly made, is that it does not appear by the return that, before ordering the work to be done, the council had complied with the requirements of the charter of the city. The power to make improvements by grading, paving, and otherwise, is conferred upon the council by the second section of a supplement to the charter, approved March 15th, 1859. The section directs that the improvement asked for shall be made at the expense of the owners of lands and real estate on the street, or section of the street where made. It

State v. Council of Elizabeth.

contains a proviso, that before the council shall determine that the improvement shall be made, or work be done, they shall give notice in a newspaper by advertisement for at least two weeks, briefly describing such road, work, or improvement, and requesting all persons who may object thereto, or be interested therein, to appear in person or by agent before the council, or their committee, *at a time and place to be designated therein*, to be heard in reference thereto. Another *proviso* directs that a like notice shall be served upon each owner of land upon or before which the improvement is to be made, if resident within the city, at least ten days before the time appointed; and if non-residents, by placing the notice in the post-office, directed to their address, if known.

The application was made to the council in May, 1859; the *certiorari* is tested November 30th, 1860; and in the interval the city clerk had died, and the street commissioner who gave the notices had removed from the state. A rule was granted by the court, upon an application in behalf of the council, that they might examine witnesses upon several points, one of which was whether the required advertisements were published and the notices given. One of the proprietors of the newspaper published at Elizabeth testified that a paper shown to him is the copy of an advertisement which appeared in that paper on the 24th and 31st May, 1859. The paper thus identified is a public notice, drawn in compliance with the proviso of the section already referred to, dated May 17th, 1859, and signed: By order of the city council. A. M. Elmer, clerk.

It was insisted that it should appear from the minutes of the council, that they had appointed the day for hearing, and that such proof was necessary to give them jurisdiction. The case of *Durant v. Jersey City*, 1 *Dutcher* 309, was cited in support of the position; but I do not think that the ruling there made by the court is conclusive against the regularity of the proceedings in this case. By the language of the charter of Jersey City, the council were directed to appoint a time and place, and give notice of the nature of the application and of the time and place for hearing. In the charter

State v. Miller.

of Elizabeth, the proviso requires that they shall give notice in the Elizabeth paper by advertisement, for at least two weeks, briefly describing the improvement, and requesting parties interested to appear at a time and place, to be designated therein, to be heard, &c. The advertisement proved is a literal compliance with the proviso, and was made by their clerk, who is the official executive agent of the council. The advertisement could not legally have been given in any other way. It appears from the affidavit of Lewis Bacon, taken on commission, that he was the street commissioner at the time, and that he gave the notices to the landholders required in the proviso of the section of the act. The fact that the street committee met on the day designated in the notice, and heard parties interested, is sufficient to show that the clerk, in publishing the advertisements, acted in furtherance of an appointment and order of the council. I am satisfied that it sufficiently appears, from the return and the proofs, that the power delegated to the council was pursued with sufficient strictness, and that they were authorized by the law to pass the ordinance which underlies their subsequent proceedings.

The proceedings of the council should in all things be affirmed.

AFFIRMED, 2 Vroom 547.

CITED in *State, Copeland, pros., v. Village of Passaic*, 7 Vroom 387; *State Van Tassel, pros., v. Jersey City*, 8 Vroom 132; *State, Watrous, pros., v. Elisabeth*, 11 Vroom 279.

THE STATE, THE MORRIS AND ESSEX RAILROAD COMPANY, PROSECUTORS, v. MILLER, COLLECTOR OF THE TOWNSHIP OF MORRIS.

1. The charter of the Morris and Essex Railroad Company subjects the company to a tax of one and a half per cent. on the cost of the road, as soon as the net proceeds shall equal seven per cent., and provides that no other tax shall be levied upon the company. By the terms of the charter, it may be altered or repealed by the legislature. The subsequent general tax law of 1862 subjected to taxation the real estate of all private corporations, "except those which by virtue of

State v. Miller.

any irrevocable contract in their charters or other contracts with the state are expressly exempt from taxation," and it repealed all acts, whether special or local, inconsistent with its provisions. *Held*, that the tax law of 1862 repealed the provision of the charter in regard to taxation, and that the assessment made upon the real estate of the company in the township of Morris was rightfully made under the general law.

2. No "irrevocable contract" can result from provisions in a charter which is made, in terms, subject to alteration, amendment, or repeal by the power granting it.
3. Where the right to alter or amend a charter, whenever the public good may require, is reserved, the legislature is the proper tribunal to determine when the right shall be exercised.

On *certiorari*. In matter of taxation upon the real estate of the prosecutors in the township of Morris.

Argued before HAINES and ELMER, Justices.

For the prosecutors, *Theo. Little*.

For defendant, *J. Vanatta*.

The opinion of the court was delivered by

ELMER, J. This *certiorari* is prosecuted by the Morris and Essex Railroad Company to test the legality of the tax assessed, for state, county, and township purposes, upon their real estate in the township of Morris, valued at sixty thousand dollars. The principal office of the company is admitted to be in the city of Newark, and this tax is assessed upon their station and track within the bounds of the township of Morris. The fifteenth section of the charter of this company provides that, "as soon as the net proceeds of said railroad shall amount to seven per cent. upon its cost, the said corporation shall pay to the treasurer of this state a tax of one half of one per centum on the cost of said road, to be paid annually thereafter on the first Monday of January of each year; provided, that no other tax or impost shall be levied or assessed upon the said company." This section has been held to exempt the company from any tax other than that specified, as well before the tax of one half per cent. shall become payable to

State v. Miller.

the state as afterwards. *The State v. Minton*, 3 Zab. 529 ; *The State v. Bentley*, *Ib.* 532.

But it is insisted that the tax law of 1862, under which this tax was assessed, has altered this provision, and subjected this and the other railroad companies in this state, whose charters are repealable, to the tax thereby imposed, and has exempted them from any tax payable to the treasurer of the state. The first question therefore to be decided is, whether the charter of the Morris and Essex railroad is subject to repeal or alteration by the legislature against the consent of the company.

Section 20th of the original charter, *Acts of 1835*, p. 32, declares "that the legislature reserve to themselves the right to alter, amend, or repeal this act, whenever they think proper." A supplement, passed in 1836, declares "that the legislature reserve to themselves the right to alter or amend this supplement, or the act to which this is a supplement, whenever the public good may require it." That an act granting corporate privileges to a body of men, and expressly exempting them from taxation, becomes, when accepted, a contract, which is protected by the constitution of the United States from being impaired, is too well established by judicial decisions, by the action of the legislature, and the acquiescence of the people, to be questioned. But the weight of authority is equally decisive, that if the act reserves a right of repeal the company takes the charter, and the contract thereby implied or expressed, subject to such alterations as the legislature may deem expedient. *Angell & Ames Cor.*, 7th edit., § 767, and *cases in notes*; 3 *Kent's Com.*, 10th edit., 306. No "irrepealable contract" can result from provisions in a charter which are made in terms subject to be altered, amended, or repealed at the pleasure of the power granting them, any more than a contract in any other manner entered into, which contains an express provision that it shall be subject to be abrogated or altered at the pleasure of one of the parties, can be considered as an "irrepealable contract." In the cases of *E. and N. E. Railroad Co. v. Casey*. 26 Penn.

State v. Miller.

301, and *Miners Bank v. U. S.*, 1 *Green's Iowa Rep.* 553, it was held, that where the right to resume the privileges granted was reserved only in cases of their abuse or misuse, the legislature were the sole judges of such abuse or misuse, and could repeal without a judicial investigation. The charter in question reserves the right to alter or amend whenever the public good may require; and that the legislature is the proper tribunal to determine what the public good requires in all matters of legislation, is too plain to be questioned. Does, then, the tax law of 1862 alter or amend the provisions in the charter of the prosecutors, exempting them from such a tax as has been assessed on them? This depends upon the determination of the question, whether the provisions of that law are plainly inconsistent with that exemption. It is well settled, that mere general words of repeal will not affect the provisions of private or municipal corporations. But this law enacts, in very specific and precise terms, that "all other acts and parts of acts, whether special or local or otherwise, inconsistent with the provisions of this act, are hereby repealed."

In the case of *Mechanics and Traders Bank v. Bridges and Boyle*, decided at June term, 1862, of this court, (*ante* p. 112,) it was held, that by virtue of this clause, all the provisions of the charter of Jersey City respecting taxation, inconsistent with it, were thereby altered and made to conform to the general tax law of the state. And, in my opinion, this clause shows a clear intention of the legislature to alter the mode of taxation before prescribed in all other special acts they had the power to interfere with. Section 7th of this law (*Acts of 1862*, p. 348,) enacts, "that all real and personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation in the manner, and subject to the exemptions herein after specified." Section 8th enacts, "that all private corporations of this state, except those which by virtue of any irrepealable contract in their charters, or other contracts with this state, are expressly exempt from taxation, shall be and hereby are required to be re-

State v. Miller.

spectively assessed and taxed." Section 13th enacts, "that the real estate of private corporations situate within this state shall be assessed to said corporation in the township or ward in which it is located, in the same manner as the real estate of individuals; and the amount of such assessment shall be deducted from the amount of the capital stock and surplus and funded debt, or of the valuable assets of the said corporation."

As these provisions are plainly inconsistent with that part of the act incorporating the Morris and Essex Railroad Company which requires them, in a certain contingency, to pay a tax to the treasurer of the state, and exempts them from all other taxes, and as the contract in this charter is not an irrevocable contract, but is subject to be abrogated or changed by the legislature, it only remains to inquire whether there is any other contract with the state expressly exempting them. No such contract outside of the charter is alleged. But it is insisted, for the company, that the words, "other contracts with this state," mean any other contracts than irrevocable contracts in their charters, and therefore include revocable contracts in their charters. I am not able, however, to adopt this construction, because it makes the two clauses of the exception in effect contradictory, and rejects the word irrevocable as wholly superfluous and unnecessary. If the legislature meant to except from the operation of this law all corporations which are in terms expressly exempted from taxation, this meaning could have been, and doubtless would have been plainly expressed in unambiguous terms. If the word irrevocable had been omitted, and the language had been, "by virtue of any contract in their charters, or other contracts with this state," there could be no doubt of the meaning. But the word irrevocable has been used evidently for a purpose, and in my opinion the result is, that the exception does not apply, unless there is a contract in an irrevocable charter, or by some provision other than that contained in the charter itself. The object of the exception evidently was to avoid even the appearance of at-

State v. Miller.

tempting to pass a law in contravention of that provision of the constitution of the United States, which prohibits the legislature of a state from impairing their contracts, and this object is fully obtained by the construction above adopted.

It was urged that the reserved right to alter or amend was not meant, and cannot fairly be interpreted to reserve the right to alter the prescribed mode of taxation in a charter which not only contains an express exemption from any other mode, but which gives to the state a prospective right to become the owner of the road and all its appendages, upon the payment of its appraised value. The answer however is, that the language of the reservation is general, and extends to all the provisions of the charter; and that the stockholders accepted and became parties to a contract, one of the express terms of which is, that the legislature may alter or rescind it whenever, in their opinion, the public good should so require. If hereafter some mode of travel should be discovered, so much superior to the railroad as to make it for the public good that the dangers incurred by the road should be wholly avoided, the charter may be repealed, and the stock rendered valueless. So if the legislature have come to the conclusion that the public good requires them to tax the road as other property in the state is taxed, they have wisely reserved the right to do so; and the company, having accepted the privileges granted to them subject to this right, cannot complain if it is exercised. If the legislature have erred in judgment, and have dealt hardly with this or with other railroads in like circumstances, as to which we have neither the means nor the right to form an opinion, the remedy is not to be sought from the judiciary, but from those whose duty it is to determine what, in this matter, is really for the public good. Some stress was laid by counsel on the inconvenience it was alleged will result from subjecting railroads, which often have real estate extending over large sections of the state, to be taxed in each particular township through which they may run, and from thus requiring all these assessments to be ascertained, and the ag-

Council of Newark v. Board of Education of Newark.

gregate amount deducted from the capital stock, at the place where the principal office is situate. But this argument is not entitled to much weight. All the inconveniences on both sides of this question were probably duly considered by the framers of the law; and it is quite possible that, in these times of heavy taxation, the inconvenience of depriving many townships of the right to tax valuable real estate within their limits, may have been considered as outweighing the mere difficulty of adjusting the assessment upon the capital stock and accumulated surplus of the company. In my opinion, this tax was rightly imposed, and the assessment must be affirmed.

Assessment affirmed.

CITED in *State, Tintner, pros., v. Morristown*, 4 Vroom 61; *State v. Douglas, Receiver*, 5 Vroom 86; *S. C.*, 5 Vroom 488; *McGavisk, Collector, v. State M. & E. R. R. Co., pros.*, 5 Vroom 511; *State, M. & E. R. R. Co., pros., v. Com'r of Railroad Taxation*, 8 Vroom 235; *S. C.*, 9 Vroom 474.

THE MAYOR AND COMMON COUNCIL OF THE CITY OF
NEWARK v. THE BOARD OF EDUCATION OF THE CITY
OF NEWARK.

The common council of the city of Newark have no power to compel the board of education to disburse, under certain terms and conditions, an appropriation for the support of certain public schools not under the charge of the board of education.

For the applicants, *T. Runyon*.

The facts appear in the opinion of the court.

VAN DYKE, J. This is an application by the mayor and common council of the city of Newark, for a *mandamus* against the board of education of that city, to compel the said board of education to disburse the sum of \$5000, appropriated by the said common council for the purpose, among certain schools in the city. The preamble, resolution, and proceedings of the common council on this subject are as follows, *viz.*

“Whereas there are, and for a long time past have been

Council of Newark v. Board of Education of Newark.

certain public schools in this city, other than the schools under the charge of the board of education, which have been and are supported by voluntary contributions, while at the same time the parents of the children educated therein are required to contribute their full proportion of taxation for the support of other public schools of the city, without deriving any benefit therefrom; and whereas it is just that provision should be made by the common-council for the maintenance of the first named schools—therefore

“*Resolved*, That the sum of five thousand dollars be and it is hereby especially appropriated to the board of education, (and the treasurer of this city is hereby directed to credit said board with the same accordingly) to be specifically and exclusively applied by them *pro rata*, according to the number of children usually attending the same, respectively, to such of said public schools, not now under their charge, as shall apply for the benefit thereof within thirty days from the time of the approval of this resolution; provided that the board shall have the power to pass upon the qualification of the teachers to be employed in these schools, as to moral and intellectual fitness, irrespective of religious tenets, leaving to the persons having charge of those schools the nomination of teachers, and the selection of books, and the appointment of religious exercises therein; and that the board shall also have the right to visit and examine those schools in the same manner as other public schools in this city; and provided also, that no application of any part of said money shall be made to any school, the attendance of scholars in which shall be less than seventy-five, and that every school which shall receive the benefit of the appropriation hereby made shall be, at least for the year ensuing the receipt thereof, free to all scholars, in the same manner as the other public schools of this city.”

Which resolution was duly approved.

June 26th, 1863, the board of education declined to disburse the appropriation thereby made in accordance with the provisions and directions of the resolution, and the common

Council of Newark v. Board of Education of Newark.

council by another resolution, passed July 1st, 1863, directed that application be made to this court for a writ of *mandamus*, to be directed to the board of education, requiring them to disburse the money so appropriated, according to the terms of the first mentioned resolution.

What kind of schools these are, for whose benefit this appropriation is made does not appear, except that they seem always to have been independent of any public authority, and never to have been under the control of the board of education of the city of Newark.

The board of education is willing to receive this money, and disburse and appropriate it according to its own judgment of its duty in such matters, but is not willing to do so according to the terms and conditions imposed by the preamble and resolution of the common council.

The charter of the city of Newark creates and provides for the election of the common council. It also creates the board of education, and provides for the election of its members. They are to be elected in the same manner and at the same times as the members of the common council. This board is by the charter made a corporation of itself, and endowed with a perpetual succession, the right to sue and be sued, &c., as corporations usually are. All its powers and all its duties are expressly provided for in the charter itself. It derives no powers, and is subject to no control from the common council. It is quite as independent of it as the council is of the board; and all the connection which there is between them, and all that they have to do with each other is, that it is made the duty of the board of education to transmit to common council, annually, an estimate of the amount of moneys necessary for the support of public schools in the city during the year, specifying particularly the several sums required for each branch of expenditure; and the common council are then to determine, by resolution, the amount of moneys to be appropriated to the public schools during the year, and raise by tax the money so appropriated; and the board of education is to expend the

Council of Newark v. Board of Education of Newark.

money so raised for the support of the public schools in the city, according to the provisions of the charter. The board of education is also required to make to the common council an annual report of the number and condition of the schools, and what has been done in and for them during the year. But in the disbursement and distribution of the money raised the board of education are given the exclusive management and control, and are in no way subject to the direction or interference of the common council, except that it cannot purchase real estate without its concurrence.

Among the powers expressly conferred on the board of education, is the selection and employment of teachers, and to provide school books, school furniture, and school libraries for the schools. But by the resolution of the common council, the board of education is to select neither the teachers nor the books to be used in the schools, nor to interfere with the religious exercises therein. All these things are to be left to the determination of other persons, having the management of the schools referred to in the resolution. We are not informed of the character of these schools, who are to teach them, or what is to be taught in them, and I can see no reason why they may not be Mahomedan, Mormon, or Chinese. And if the common council have the power claimed, and if we order this *mandamus*, the board of education may be compelled to become the protectors and guardians of schools, for the teaching of the exalted and bewildering delights of the koran, the inexpressible blessings of an indefinite number of wives, or the sublime and idolized philosophy of Confucius. I do not think that the board of education is bound to do any such thing, or that the common council of the city have any such power over them.

I think, therefore, that the *mandamus* applied for should not be ordered.

Mandamus refused.

Read v. Barker.

JOSEPH M. READ v. THOMAS BARKER AND CHARLES BARKER.

1. Read, the defendant, leased to Barker and Barker, the plaintiffs, a mill and water power, and covenanted with them for the use of the water in as full and ample a manner as he had enjoyed it. The plaintiffs alleging that the defendant had placed a trunk in the pond in such manner as to carry off the water of a certain spring, which was one of the principal tributaries to the pond, brought suit to recover damages. *Held*, that the opinion of millers and millwrights, whether they be called experts or practical men, as to the quantity of grain the mill was capable of grinding and the value of the water for milling purposes, together with the statement of the method used for measuring or weighing, was competent evidence.
2. When a witness, who has been in attendance during the progress of a trial, fails to appear when called, the court will not reverse the judgment for that cause, no motion having been made to postpone the case or procure the testimony of the witness *de bene esse*; and especially when it appears that the evidence of the witness, had he been present, would have been only cumulative.

On *certiorari* to the Warren Pleas in case of appeal from a justice's court.

For plaintiff in *certiorari*, *J. G. Shipman*.

For defendants, *D. A. Depue*.

HAINES, J. This was an action of covenant, tried before the court and a jury of the county of Warren, upon an appeal. The defendants in *certiorari*, who were plaintiffs below, complained that the defendant below had leased to them a mill and water power, and covenanted with them for the use of the water in as full and ample a manner as he had held and enjoyed it, and that he did not keep his covenant, but violated it by diverting a part of the water to their injury. The particular diversion complained of arose from the defendants having placed a trunk in the pond in such a manner as to carry off the water of a certain spring, which was one of its principal tributaries. A verdict and judgment having

Read v. Barker.

been rendered for the plaintiffs below, the defendant seeks to have the judgment reversed. One of the reasons for reversal assigned is, that the declaration is defective and insufficient. The declaration, although not very artistically drawn, sets forth with reasonable certainty the cause of complaint, and is substantially correct, and sufficient in a court for the trial of small causes. The defects, if any, are only of form, such as were formerly the subject of special demurrer in a common law court, and such as, under the present practice, would be amended on motion at any time during the progress of the cause. Another reason assigned is the admission of illegal evidence. The court received the evidence of witnesses in regard to the measurement of the water discharged from the trunk, on the morning of the trial before the justice. This was objected to on the ground that the plaintiffs were bound to make out a cause of action existing before the commencement of their suit. But it did not follow that they had failed to show a cause of action, because they gave evidence of the quantity of water subsequently discharged. They had shown the fact of the placing the trunk, and the diversion of the water of the spring. The evidence received was one of the means of showing the quantity of water lost, and the extent of the injury. The jury had for their consideration the time when the measurement was made, and the condition of the spring at that time, and at several times before the commencement of the action, and, by comparison, could judge of the loss. It was not conclusive evidence of the amount of the water diverted, but it was competent as tending to show it. Again, it is said that illegal evidence was admitted, in the opinions expressed by the witnesses of the quantity of grain which the mill was capable of grinding and of the value of the water for milling purposes. The witnesses on this subject were millers and millwrights, experienced in the construction of mills and in their use. The extent of their knowledge was shown to the jury, and their judgment and opinions as expressed, whether they be called experts or practical men acquainted with the

Read v. Barker.

subject, were competent. The value of commodities is usually, in part at least, a matter of opinion, and those acquainted with an article and its value may express their judgment, their belief, or opinion, as to quantity or the subject of measurement or weight ; and it is proper for witnesses, in connection with the statement of the method used for measuring or weighing, to express their opinions of its accuracy and their estimate of the quantity. There was other evidence received against objection, but I cannot see that the court violated any rule of evidence, or committed any error by its admission. During the progress of the trial, a witness, who had been in attendance on the part of the defendant, failed to appear on the morning to which the court had been adjourned ; and this is alleged as a surprise upon the defendant and good ground for setting aside a verdict in a court of common law, and for a reversal of the judgment in this case. When the absence of the witness was discovered, no motion was made to postpone the cause or to procure the testimony of the witness *de bene esse*. The evidence which that witness would have given, had he been present, is shown by affidavit, and it is manifestly only cumulative. Other witnesses had testified to the same matter, and covered all of the ground as fully as the absent witness could have done. No prejudice arose from his absence, and this would have been no reason for setting aside a verdict, nor is it a sufficient ground for the reversal of the judgment.

The judgment of the Court of Common Pleas must be affirmed.

ELMER, J., concurred.

Judgment affirmed.

Bond v. Cox.

JOSEPH W. BOND ET AL. v. EDWARD W. COX.

1. On an application for the benefit of the insolvent laws, creditors may examine witnesses or offer evidence on the subject of the arrest of the debtor.
2. Opposing creditors, or their counsel, have a right to propound interrogatories to the debtor in respect to his giving an inventory to the officer who arrested him, and it is the duty of the court to allow all interrogatories that are legal and pertinent.
3. In order to give the court jurisdiction of such application, the debtor, at the time of giving bond, should be under arrest or held in custody.

On the 3d May, 1862, Cox was arrested by the sheriff of the county of Burlington, upon a writ of *ca. sa.*, issued out of the Circuit Court of said county, at the suit of Joseph W. Bond *et al.* On the 16th September, of same year, he filed a petition to be discharged under the act abolishing imprisonment for debt in certain cases. The application came on to be heard before the Common Pleas of said county on the 25th November, at a special term of the court; when, after the hearing the defendant and the plaintiffs as opposing creditors, the defendant was discharged.

A *certiorari* was sued out by the plaintiffs to remove the proceedings into this court, and a state of the case, signed by the judges of the Pleas, has been returned with the writ, which is as follows: "This cause came on to be heard," &c., (omitting the formal part).

"The counsel for the applicant offered in evidence the papers filed in the case and the proceedings of the court at the term of September then last past, and proved, by affidavit, the publication of the notice of this application on the plaintiffs and the non-residence of the other creditors. The applicant was then sworn, and in answer to interrogatories administered by the clerk of said court, testified: that before the 16th September, 1862, and subsequent to the then next preceding term of this court, he was arrested for debt or damages, and gave bond pursuant to the act in such case

Bond v. Cox.

made and provided; that his arrest was compulsory; that the account annexed to his petition contains a fair and true account of all his estate, both real and personal, either in possession, remainder, or reversion; and also a just and true inventory of all his deeds, bonds, notes, books of account, vouchers, and specialties whatever, with the sum due thereon; and a list of all his creditors, with the amount of debts due to them and owing, and that he had advertised the hearing, and given notice thereof to his several creditors, as the laws of New Jersey direct.

"And on a cross-examination by the counsel of the opposing creditors, the said applicant further testified, that he was arrested on Saturday afternoon, the afternoon of the day that the hearing was had before Judge Vredenburg; that he was arrested by sheriff Leeds, at the store kept by himself, and told the sheriff that he would come up to the jail; that he afterwards, about seven o'clock, went up to the jail, and surrendered himself to the custody of the sheriff; that he was released from the custody of the sheriff that evening; was not locked up, was not detained; and that Mr. Levis and Mr. Conover were there with him; that he was allowed by the sheriff to go away that evening; that the sheriff was present at the time he left, and that he then went down to his place of business; that he was free on the next day; that the following Monday he proceeded and gave bond to the sheriff, and that Samuel A. Dobbins and Benjamin F. Shreve were his bondsmen; which bond was then and there produced and shown, bearing date the fifth day of May, A. D. eighteen hundred and sixty-two.

"The answers given by the applicant on the said examination and cross-examination were reduced to writing by the clerk of the court under the direction of the court.

"The counsel of the opposing creditors then asked leave of the court to question the applicant in regard to his giving an inventory; which was objected to by the opposing counsel; and the court, after hearing argument, refused to allow the counsel of the opposing creditors to ask the applicant any

Bond v. Cox.

questions in regard to the inventory, and the counsel for the opposing creditors then took exceptions to such decision as erroneous.

“The counsel of the opposing creditors then asked leave of the court to call the sheriff who made the arrest, to interrogate him in regard to the facts of the arrest of said applicant, and of his subsequent release, and the time and manner of giving the said bond and alleged inventory, which was also denied by the court; and the counsel for the opposing creditors then excepted to such decision as erroneous.

“The counsel for the applicant then moved to discharge the prisoner, to which the counsel for the opposing creditors objected, for two reasons:

“First, because there was no such inventory, as required by the statute, annexed to the bond given to the sheriff, which said inventory was in the words following, to wit: “Inventory of Edward A. Cox, of Mount Holly, in the county of Burlington, made pursuant to the second section of the act entitled, ‘an act abolishing imprisonment on civil process in certain cases,’ this fifth day of May, in the year of our Lord one thousand eight hundred and sixty-two. No goods, chattels, rights, credits, lands, tenements, or real estate (save only the goods set apart by the sheriff of the county of Burlington for the use of a debtor having a family, according to law). Second, because, at the time of the giving of the bond to the sheriff, (as appeared by the testimony of the applicant) the said applicant was not under the arrest of, or in the custody of the sheriff, and therefore was not entitled to give bond or make application for this discharge; both of which objections were overruled by the court, and the counsel for the opposing creditor then excepted to such decision as erroneous.

“The court then proceeded, and appointed Franklin B. Levis as assignee, to whom said applicant forthwith executed an assignment of all his estate whatsoever, real and personal, wheresoever and whatsoever, and all deeds and vouchers whatsoever relating to the same. Whereupon the said court

Bond v. Cox.

did order and direct the said Edward B. Cox to be discharged from the custody of the sheriff of the county of Burlington on account of any debt by him previously contracted."

The plaintiffs assigned, as reasons for setting aside the judgment and proceedings of the Common Pleas, that the court erred in refusing to allow them to examine the applicant in regard to his giving an inventory, and to offer any evidence in regard to the arrest of the applicant, his subsequent release, and the time and manner of his giving bond and security; and because there was no legal inventory given to the officer, and the applicant was not under arrest at the time of giving the bond.

For the plaintiff in *certiorari*, *F. Voorhees*.

For the defendant, *E. Merritt*.

The opinion of the court was delivered by

HAINES, J. Edward A. Cox, having been discharged, as an insolvent debtor, by the Court of Common Pleas of the county of Burlington, the plaintiffs in *certiorari*, being creditors, question the legality of the proceedings. One of the reasons assigned for reversing the judgment and setting aside the proceedings is, that the creditors were not allowed by the court to examine witnesses, or to offer any evidence on the subject of the arrest of the debtor. On such hearing, witnesses are to be examined to prove the service and publication of the notices of the application and all preliminary questions, that the court may determine whether the applicant is in a condition to be heard; his creditors having had no opportunity of being present to make their objections. One of the requirements to the condition of the creditor to be heard is, his being under arrest or in custody at the time of giving bond conditioned for his making application for his discharge. He must show, to the satisfaction of the court, that he has a right to make his application; that he was either in actual custody under the act of 1795, and its sup-

Bond v. Cox.

plements, or in the constructive confinement of subsequent acts. He is competent to prove his arrest or confinement, but his answers to interrogatories on that question are not conclusive. The court may, if it see fit, require additional evidence, or the creditors may controvert his statement. *Hamilton v. Chevallier*, 3 *Harrison's R.* 434. In *Wallace v. Coil*, it was by this court, after full argument, held that evidence offered by the opposing creditor, to show that the cause of imprisonment was such that the debtor was not entitled to his discharge, was properly received. In this case the court erred in not permitting the creditors to introduce proof on that subject.

2. Another reason assigned is, that the court refused to allow the opposing creditors, or their counsel, to ask the debtor any question in respect to his giving an inventory to the officer who arrested him. The act of February, 1830, re-enacted 15th April, 1846, *Nix. Dig.* 331,* prescribes the terms on which a person arrested or held in custody, in any civil action, may be discharged from such arrest or custody. One of those terms is the delivery to the officer of a true and perfect inventory, under oath, of all his property, rights, and effects. The delivery of the inventory was held by the court, in *Davis v. Hendrickson*, 3 *Green's R.* 481, to be necessary to place the debtor in a condition to make application for his discharge as an insolvent debtor. It is only on the delivery of the bond mentioned in the statute, together with the inventory, that the officer had a right to discharge him from custody. It was proper, therefore, that the creditors should have been permitted to inquire respecting this first preliminary step in the proceedings to obtain his discharge, and the refusal was an error in the court below. On the argument here, it was insisted, and it seems to have been made a point before the Court of Common Pleas, that the creditors have *de jure* no power of examination; that they can examine only by permission of the court. The statute provides for the examination of the debtor on interrogatories proposed by the court; but it does not contemplate that the

**Rev.*, p. 857.

Bond v. Cox.

court will, of itself, dictate or write the interrogatories. It may, and usually does act through its officers, the clerk, or counsel. The statute gives power to control the course of examination, and to prevent illegal or irrelevant questions, and to exercise therein a legal, and not an arbitrary discretion. But it is the right of the opposing creditor to propound interrogatories, and the duty of the court to allow all that are legal and pertinent to be put to the debtor. The creditor is a party to the proceedings, entitled to be heard, and to make a ground for his objections through interrogatories. The creditor stands somewhat in the relation of a witness, to make his case and show his right to a discharge; the interrogatories proposed by the creditors are in the nature of a cross-examination, and if legal and pertinent, should not be overruled.

3. Another reason for reversal is, that the debtor, at the time of giving bond conditioned for his appearance, and application for the benefit of the insolvent laws, was not under arrest or held in custody. The court can entertain no jurisdiction of such an application, unless it is alleged in the petition, and shown on the examination of the debtor, that he was under arrest or held in custody at the time of giving bond. The bond and inventory, so given are substituted for the actual confinement within the four walls, and for the prison limits provided by statute. This requisite is as indispensable to the creditor, to apply for a final discharge in the one case as in the other. He must either be in actual confinement within the walls of the prison, or in the prison limits, or under the obligation of the bond required by the act. By the 5th section of the act for the relief of persons imprisoned on civil process, *Nix. Dig.* 352,* it is made the duty of the court at the time of the hearing, to examine the debtor touching his confinement, whether his imprisonment was compulsory or voluntary; and if it appear that his confinement was not compulsory, to stay all further proceedings in the case. The debtor must, therefore, not only have been under arrest or in custody, but under compulsory confinement. By the state

**Rev.*, p. 479, § 10.

Cook v. Smith.

of the case, it appears that the debtor was arrested on a writ of *capais ad satisfaciendum* on the third day of May, 1862, and was in the custody of the sheriff at the jail, but not locked up; that he was released from the custody of the sheriff that evening, and by him allowed to go at large; and that, on the fifth of May, he executed and delivered to the sheriff the bond conditioned for his application for a discharge. The debtor clearly was not in custody nor under the control of the officer at the time of giving the bond. The sheriff, by suffering him to go at large, was guilty of a voluntary escape, and had no power to re-arrest him. If, as was suggested on the argument, the right to re-arrest was personal with the debtor, and that with his assent the sheriff might again take him into custody, then such consent made the confinement voluntary, and not compulsory, and the court was bound to stay all further proceedings in the case.

The discharge of the debtor under such circumstances was erroneous, and the judgment and proceedings of the Court of Common Pleas must be reversed and set aside.

SIMEON COOK, EXECUTOR OF PETER SMITH, DECEASED,
v. DAVID SMITH, SURVIVOR OF GARRET SMITH, DE
CEASED.

1. Where a witness testifies that he has often seen the plaintiff write, and that he takes his signature to a receipt offered in evidence to be genuine, and the court admits the receipt to go to the jury, this is *prima facie* evidence of the genuineness of the receipt; and if, without any further evidence upon the subject, the jury regard the receipt as a forgery, the verdict will be set aside as contrary to the evidence.
2. The seventh section of the act of 1854, *Nix. Dig.* 851, assessing the tax on the mortgagor, where the mortgagee resides out of the township, is not unconstitutional as impairing the obligation of contracts, and the oath of the collectors and their receipts are *prima facie* evidence of the proper payment of such tax.

This action was brought to recover the amount due on three several bonds, given by Garret Smith and David Smith

Cook v. Smith.

to Peter Smith, in his lifetime, each for the payment of one thousand dollars. The defendant pleaded payment, and gave notice of set-off. On the trial much evidence was offered to show partial payments at different times, and also to show the transactions and dealings of the parties in reference to the bonds. The jury rendered a verdict for the plaintiff for the sum of \$3454.73. A rule to show cause why this verdict should not be set aside was granted, on application of the defendant, and was argued, in the term of June last, before VREDENBURGH, OGDEN and VAN DYKE, Justices, upon a state of the case agreed on by counsel.

As the grounds of this application and the principal facts relating thereto are sufficiently shown in the opinion of the court, it is deemed unnecessary to insert the case itself, which is of great length, and embraces many matters not brought in question on the argument of this rule.

Attorney for the plaintiff, *P. B. Kennedy.*

Attorney for the defendant, *J. G. Shipman.*

The opinion of the court was delivered by

VREDENBURGH, J. This was an action of debt brought in this court on three several bonds, dated the 1st July, 1847, for \$1000 each, given by David and Garret Smith to Peter Smith, payable 1st April, 1851, with interest annually from 1st April, 1847.

The pleas were payment to Peter Smith, in his lifetime, and to the executors since his death, and notice of offset. The cause was tried at the Warren Circuit, December term, 1862, and a verdict for the plaintiff for \$3454.73. The defendant now moves that the verdict be set aside, as being too large.

It appears, by the case, that one Peter Smith, the father of the defendant and of the plaintiff's testator, on the 1st of April, 1847, owned a farm and divers personal property in the township of Oxford, in said county of Warren, and then

Cook v. Smith.

sold it to his sons, Garret and David, for \$8000, and \$60 per year paid unto the son, Aaron Smith, during the life of his father. Four thousand dollars of the said purchase money was paid for, by the work previously done by the defendants for their said father, and the remaining \$4000 was paid for, by four several bonds for \$1000 each, three of them payable to the father, with interest, and the other, the interest payable to the father during his lifetime, and the principal payable to Aaron at the death of the father.

Peter Smith, the father, died on the 11th October, 1860. The interest on the fourth bond, payable to Aaron Smith at the death of his father, was fully paid up by the defendants.

The questions in controversy therefore relate to the other three bonds, and the interest due on them.

The controversy is about the payments made on these three bonds and the offsets properly allowable against them.

The plaintiff claims that, on the 1st April, 1859, there was due, for principal on these three bonds, \$2800, which, with the interest, \$654.73, from that time until the 26th February, 1863, the time allowed by the jury, make the \$3454.73 allowed by the jury. The defendant, on his side, insists that there was not due for principal on these three bonds, on the 1st April, 1859, the said sum of \$2800, but some lesser sum. It appears that, on the 14th May, 1859, Peter Smith and Garret and David Smith got together, and looked over their accounts, and upon that occasion Peter Smith made the following endorsement on each of the three bonds: "Rec'd May 14, 1859, on the within bond the interest thereon in full to the 1st day of April last," and also a receipt on one of the bonds for \$200 on the principal, as of the 1st April, 1859. This of course left due on the three bonds \$2800, of principal, on the 1st April, 1859, which the plaintiff claims to be the true amount, and which the jury have allowed.

The controversy is whether this \$2800, due as principal on the 1st April, 1859, is the true amount. The interest on the four bonds, from the 1st April, 1847, to the 1st April, 1859, twelve years, is \$2880. On the 1st April, 1859, Peter

Cook v. Smith.

Smith received, as appears by *Exhibit No. 4*, \$3080 on the bonds, which paid up the interest on the four bonds and \$200 on one of the three bonds now in suit. This *Exhibit No. 4* contains the items which make up the said \$3080. The plaintiff contends that these are all the items that the defendant is entitled to. The defendant contends that they are not, but sets up that, besides these, he should be credited :

First. With a receipt of \$240, dated April 2d, 1851, which he alleges was not brought into the account.

Second. The defendant claims that the payments over, are the amounts of interest due at the time they were paid, and which should, to that extent, be deducted from the principal.

Third. The defendant claims that he should be credited with his book account, which has not been done.

Fourth. The defendant alleges that he paid the taxes on the bond, which should be credited.

First. As to the \$240 receipt, the receipt is in evidence. It is dated April 2d, 1851, and reads as follows :

"\$240. Received from David and Garret Smith two hundred and forty dollars, interest on account of bonds I hold against them." Signed "Peter Smith."

The plaintiff sets up, as to this receipt—first, that it is a forgery, and upon this point the evidence is that of William P. Robeson, who testifies : "I have often seen Peter Smith write, and take the signature to that receipt to be genuine. If the signature to this receipt had come to me in the course of business, I would not have hesitated to take it, from the general appearance of it." Whereupon the court admitted the paper. This is all the evidence there was at the trial, upon the genuineness of the receipt. If the jury rejected the receipt on the ground of its genuineness, their verdict is against the weight of evidence. It was proved in the ordinary way. It was not necessary for the defendant to prove more until it was to some extent impeached. If the jury rejected it as a forgery, they must have acted on evidence not sworn to before them.

It is next suggested that the jury rejected this receipt be-

Cook v. Smith.

cause they believed it had already been allowed by the defendant in the endorsement on the bonds of the 1st April, 1859. But, in the first place, the presumption would be, if it had been allowed then, it would have been taken up or referred to in some way, and not left outstanding, as this was, in the hands of the defendant entirely unexplained. But, in the next place, the evidence shows conclusively that it was not included in the endorsements of April 1st, 1859. The evidence upon the question, whether this \$240 receipt was endorsed on the bond was, first, the endorsements themselves, which are in these words, "Rec'd May 16th, 1859, on the within bond, the interest thereon in full to the 1st day of April last."

It is contended by the plaintiff that this is *prima facie* evidence that this particular receipt was included. I do not see how so. So far as the simple endorsement goes, it does not appear that the defendant was present, or assented to it, or had anything to do with it. In the absence of any other proof, the presumption would be that the obligee only endorsed those payments for which there were no loose receipts standing out; and thus shows no presumption that this particular payment was endorsed, but the contrary thereof. The only other evidence that this receipt was included, is that of Aaron Smith, who says, "that in May or June, 1859, he saw the obligee and Simeon Cook go to the defendant's; the obligee and William Cook came back together; the obligee said he had been to defendant, and got a check of the defendant for \$1000. I do not see how this shows, either that the defendant was present at any settlement in May, 1859, or that this receipt was endorsed, or that the defendant was present when endorsed. But if it does, then it also shows that, at said settlement, Simeon Cook was present, and acted as the agent of both parties in arranging and making the calculation. But if we are to consider this as evidence, then it is also evidence that on that occasion the defendant, the obligee, and Cook, the present plaintiff, were all present, and that Cook acted as agent of both parties.

Cook v. Smith.

The endorsements on the bonds are in Cook's handwriting. A paper, produced by the defendant, and marked *Exhibit No. 4*, is also in Cook's handwriting, and the same facts that establish the presumption that the defendant was present, and assented to the endorsement on the bond, also establish the fact that *Exhibit No. 4* was made then by Cook, as the agent of both parties, and delivered by him to the defendant as evidence of what was really taken into the computation, in making the endorsements on the bonds. This *Exhibit No. 4*, being thus authenticated, shows upon its face that this \$240 was not taken into the calculation, for it shows the items which did make up the calculation, and this item is not among them; nay more, this *Exhibit No. 4* says, upon its face, that the loose receipts which were credited on said bonds were delivered to the obligee, whereas this receipt is produced by the obligor. If it had been credited, it would have been delivered up with the others.

It is manifest that this \$240 receipt should have been allowed by the jury.

The next complaint of the defendant is, that the jury rejected the whole of his account. As to that part of it liable to be affected by the statute of limitations, the jury did right; as to that part of it not liable to the statute, the jury rightly rejected all charges for cash; as to the rest of the account, it is proved by the defendant's book of account; the book is proved and unimpeached, and supported by other evidence, and no evidence against it. It ought to have been allowed by the jury.

The next complaint is, that the jury disallowed the defendant's payment of taxes on the bond.

These taxes were, \$16, December, 1857; \$16, December, 1858; \$16, December, 1855; \$16, December, 1856; \$16, December, 1859; \$16, December, 1860; \$16, December, 1861. These payments were proved by the collectors to whom they were respectively paid; two of the duplicates, for the years 1857 and 1858, were also read in evidence, showing

Cook v. Smith.

the assessments for these bonds. These payments were all rejected by the jury.

The court charged the jury that the law creating these taxes, having been passed after these bonds were given, impaired the obligation of contracts, and was therefore void, and charged that the jury should not allow the taxes, because there was no legal proof that they had been legally assessed.

First, was the tax law in question unconstitutional as regarded bonds made before its passage? These bonds were made in 1847; the taxes were for the years 1856 to 1861, inclusive. The law, *Nix. Dig.* 851, § 7,* provides that every person shall be assessed in the township where he resides for all the personal estate owned by him; provided that where the holder of a mortgage shall not reside in the same township where the mortgaged premises lie, the tax or the money secured shall be assessed against the mortgagor, and paid by him in the township where the lands lie, and the receipt of the collector shall be a legal payment for so much of the interest. Here the mortgagee lived in a different township, and the taxes were paid by the mortgagor. I cannot see in what sense such an assessment can be unconstitutional, without making all taxes whatever unconstitutional. It is a tax upon property—upon the bond and mortgage; it in no sense impairs the obligations of a contract; on the contrary, it affirms the contract, and taxes the subject for sustaining it.

In the second place, as to the charge of the court, that these taxes could not be allowed because no proof that they were legally assessed. As to the years 1857 and 1858, the duplicates were in evidence, and that is conclusive evidence of its proper assessment. As to the other years, the proof shows that if not assessed, it ought to have been, and the presumption is that the public officers performed their duty, and did do it. In the next place the mortgagor produced the receipts of the collectors, and their oaths that they were actually paid. The act, *Nix. Dig.* 851, § 7, says, "the receipt of the collector shall be a legal payment for so much of the

**Rev.*, p. 1153, § 66; p. 1163, § 110.

Cook v. Smith.

interest." The law, therefore, expressly declares the receipt of the collector shall be a legal payment of so much of the interest. The mortgagor, therefore, showed a legal payment of so much of the interest, by express statutory enactment, and it was not necessary for the mortgagor to produce either the assessment or the duplicate. The jury should have allowed all these taxes.

The next complaint of the defendant is, that the jury calculated the interest on an erroneous principle. The jury, as is manifest from their verdict, made no reference to whether the payment overran the interest—they merely took as true the endorsement that the interest was paid up to the 1st April, 1859, and calculated interest afterwards. The plaintiff seeks to justify this by saying that, on the 1st April, there was a settlement between the parties, when they agreed to this mode of calculation, and that *ignorantia legis non excusat*.

But the difficulty is, there is no such settlement proved. If we reject *Exhibit No. 4*, there is no evidence that the defendant was present, or ever assented to any such calculation; and if we admit *Exhibit No. 4*, it shows upon its face that it was only a credit of such loose receipts as were delivered up to the obligee, and not a final settlement, or indeed any settlement at all, but only a credit of such loose receipts as were then produced. There was therefore nothing final, when the endorsements of interest were made, and the whole matter was left open. It was good as far as it went. It was a good endorsement for the receipts delivered up and the payments then made, but foreclosed no rights.

I think the jury should have allowed—first, the taxes to be credited on the interest, and on the interest only; second, this \$240 receipt, as of its date; third, the book account, except what had been running over six years, and the charges for cash; and that, in calculating interest, the jury should have credited—first, the taxes upon the interest only; secondly, the payments, crediting from time to time

State v. City of New Brunswick.

upon the principal so much of the payments as overran the interest.

If the plaintiff agrees to remit the damages in accordance with these principles, let the verdict be entered; if not, let it be set aside, and a *venire de novo* awarded.

OGDEN and VAN DYKE, Justices, concurred.

CITED in *State, Vail's Ex'rs, pros.*, v. *Runyon*, 12 *Vroom* 106.

THE STATE, JAMES PARKER, PROSECUTOR, v. THE MAYOR,
ETC., OF THE CITY OF NEW BRUNSWICK.

1. An incorporated city has jurisdiction over a turnpike road constructed within the limits of the city, for the purpose of regulating, grading, and paving it; but has no right to regulate and grade the street so as to injure the turnpike company, or to interfere with their chartered rights: for police purposes, it has authority to make such municipal regulations as it may deem expedient. The common council has no right to require the turnpike company to grade or pave their road; but if the road be regulated, graded, and paved under a city ordinance, and the owners of adjoining lots assessed for the expenses of the same, it is no excuse for refusing to pay such assessment that the rights of the turnpike company are infringed.
 2. The owners of adjacent lots have no vested right to require the turnpike company to bear the expenses of such grading, &c., nor to have the road continued at its original grade.
 3. It is no objection to an ordinance for such grading, &c., that the fee of the soil of the road is in the turnpike company.
 4. If an ordinance requires a street to be properly regulated and graded, &c., without any fixed grade being established, and afterwards provides that the work be done under the superintendence of the city paver, or other person appointed by the common council, and this is in accordance with the terms of the charter, it is sufficient.
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On *certiorari*. In matter of assessment for grading and paving part of Easton avenue under an ordinance of the city council.

Parker and *Keasbey*, attorneys of plaintiff.

HAINES, J. The mayor, recorder, aldermen, and common

State v. City of New Brunswick.

council of the city of New Brunswick, by an ordinance, passed the seventh day of May, A. D. 1860, ordained that the owners and occupants of the several lots fronting or lying on Easton avenue, between Prospect street and Richardson street, in the city of New Brunswick, should cause that portion of said avenue, lying in front of their respective lots, to the centre thereof, to be properly regulated and graded, and the gutters thereof to be properly graded, paved, and curbed, and the sidewalks to be properly graded and paved, in the whole length thereof, with flag-stone or brick, not less than four and a half feet in breadth, in a good and substantial manner, under the direction of the city paver, or other person appointed by the common council. The prosecutor, being the owner in fee of certain lots of land fronting on that avenue, was assessed for a portion of the cost of executing the ordinance; and complaining of the assessment, he seeks to have it set aside on two several grounds—first, that no jurisdiction exists in the city council to order or execute the grading of this street; secondly, that the ordinance is void for uncertainty, or at least is too vague in its terms to form a ground for penalty on non-compliance.

1st. On the ground of want of jurisdiction, it is insisted that the street is a part of the road of the New Jersey Turnpike Company; that the land itself belongs to them; that it constitutes a part of the road, for traveling over which the company charges and receives toll; and that therefore the company has the right, and to them belongs the duty of regulating the road, and that the common council have no right to impose that duty on others, or to do it themselves. The act to incorporate the city of New Brunswick, passed February 20th, 1849, by its 10th section, provides that it shall be lawful for the common council of the said city to make and establish ordinances and regulations for the leveling, grading, regulating, paving, curbing, flagging, or gravelling of the streets and sidewalks of the said city, and to require the work to be done by the owners or occupants of lots fronting on or adjoining said streets, and to be super-

State v. City of New Brunswick.

intended by the city paver, who, under the common council, shall prescribe the manner in which such work shall be done. The act to incorporate the New Jersey Turnpike Company, passed February 27th, 1806, authorizes the construction of a turnpike road, four rods wide, beginning in the city of New Brunswick, in Albany or French street, between the bridge and the fork of said street. This seems to contemplate that the road so constructed is to be within the city, and one of its streets. By the state of the case, it appears that the turnpike road so constructed is one of the public recognized streets of the city, and known as Easton avenue. Hence it is obvious that the common council have jurisdiction over the streets of their city, for regulating, grading, and paving, and over the part of the road in question, as one of those streets. They have no right to regulate or grade the street so as to injure the turnpike company, or to interfere with their chartered rights. But they have, for police purposes, the authority to make such municipal regulations as they deem expedient. They may have no power to require the turnpike company to grade their road or to pave it. But if, in their judgment, the health, comfort, convenience, or prosperity of the city requires it, they may order the street to be regulated, graded, and paved at the expense of the owners or occupants of the lots fronting on it; and it is no excuse for the owners to say, that the rights of the turnpike company are infringed. When that company complains, their rights will be ascertained and protected. The improvement is presumed to be for the benefit of the owners, and to increase the intrinsic value of their lots; and there is no injustice in requiring them to pay the expense of an improvement, which is to contribute to their enjoyment and to promote their interest. There is no vested right in the owners of the adjacent lots to require the turnpike company to bear that expense, nor to have the road continued at its original grade. They have the right, in common with other citizens, of requiring the turnpike company to keep their road in the condition required by their charter, under the

State v. City of New Brunswick.

penalties provided for neglect. If the company may abandon their road, as is suggested by the counsel of the prosecutor, what, on such abandonment, would become of the supposed vested right? It would surely vanish, and that without any just cause of complaint. The right to abandon the road, is wholly repugnant to any right to the owners of the adjacent lands to require its continuance. I can see no reason for objection to the ordinance in the fact, that the fee of the soil of the road is in the turnpike company. Should they abandon the road, the public authorities can order it to be laid out and opened as a street or public highway, making due compensation, the same as might be done if the company had only the right of way, and the fee were in the owners of the adjacent lots. Nor can I see the force of the argument, sought to be drawn from the act of March 19th, 1857, which authorizes the turnpike companies of Springfield and Middlesex to cede and transfer to the city of Newark any part of their respective turnpike roads lying within that city. The object of that act was chiefly, to enable those companies to cede parts of their respective roads, and to relinquish the repairing and control of such parts, without affecting their right to the use and enjoyment of the other parts as before used and enjoyed.

2d. The other reason for setting aside the assessment is, that the ordinance is uncertain and vague in its terms. The ground of the objection is, that no fixed grade had been established, but that the ordinance required the street to be properly regulated and graded, and the gutters to be properly graded, paved, and curbed, and the sidewalks to be properly graded and paved with flagging or bricks, &c. This objection would have been well taken, had the ordinance made no other provision for the regulation of the work. But it does provide for it, and declares that it is to be done under the superintendence of the city paver, or other person appointed by the common council; and this is in accordance with the terms of the charter of the city, which authorizes the common council to require the work to be done by the owners

Berry v. Doremus.

or occupants of the lots, and to be superintended by the city paver, who under the common council, shall prescribe the manner in which the work shall be done. There is no reason why the common council may not regulate the grade, and prescribe the manner in which the work should be done, as well through a competent city paver as by a committee of their own body, or a street commissioner. Whether they could or could not, it is sufficient for the purpose that the charter authorizes them so to act. It may be that the grade would not be uniform, or such as would be the best. But the abuse of a power is no argument against its proper exercise. The ordinance required the work to be properly done, under the direction of the officer named in the charter. It does not appear that any offer on the part of the prosecutor was made to do the work, or that he failed to do it for the want of information of what was the proper grade, or the proper mode of paving and grading. There appears to be no reason for setting aside the assessment, and it must therefore be affirmed with costs.

Assessment affirmed.

ELMER, J., concurred.

CITED in *State, Sigler, pros., v. Fuller, Collector*, 5 Vroom 233, 235.

HENRY H. BERRY, ADMINISTRATOR OF HANNAH RYERSON, DECEASED, v. JACOB G. DOREMUS.

1. M. owed R. for board, and in 1849 sold a lot of land to D. In consideration thereof, D. promised M. that he would pay, as part of the consideration money, to R. \$100 per year after the death of M., as long as R. should live. M. died in 1849, and R. in 1858. On an action of assumpsit, brought by the administrator of R., D., in 1859—
2. *Held*, that it was no ground of non-suit, either because the statute of limitations, nor because it was a suit brought for an annuity, nor because it was an attempted testamentary disposition, nor because it was a proviso to pay the debt of another, nor because it was an agreement to be performed within one year, nor because it was an attempt to create a trust.

Berry v. Doremus.

In assumpsit. On case stated for advisory opinion of this court.

James Mead, in 1849, sold a house and lot, in New York, to Jacob G. Doremus, the defendant, for \$5000; and the said defendant thereupon, and in part consideration of the purchase, promised the said Mead that he would pay to Hannah Ryerson, the plaintiff's intestate, to whom he was indebted for board, the sum of \$100 per annum, after the death of said Mead, so long as the said Hannah Ryerson should live. Jacob Mead died in 1849, and Hannah Ryerson in 1857. After the death of Hannah her administrator, Henry H. Berry, brought this action to recover the amount due on said promise.

On the trial at the Morris Circuit, the plaintiff having rested his cause, the defendant moved to nonsuit on six several grounds, as stated below in the opinion of the court. The nonsuit was granted, and the Circuit Court certified the case to this court for their advisory opinion, whether the nonsuit was rightly granted upon any of the grounds taken.

For the plaintiff, *A. W. Bell*.

For the defendant, *J. Vanatta*.

VREDENBURGH, J. This is an action of assumpsit, brought by the plaintiff against the defendant, upon a promise alleged to have been made by the defendant to the plaintiff's intestate, on the 2d day of April, 1849, by which the defendant, in consideration of a sale to him, by one James Mead, of the house and lot No. 33 Leonard street, in the city of New York, at the price of \$5000, promised Mead to pay the said intestate, as part of the said purchase money, one hundred dollars a year, after said Mead's death, during her natural life. The plaintiff, on the trial, proved the execution and delivery of the deed for the said premises by Mead to the defendant, on the said 2d day of April, 1849, the promise to Mead, by the defendant, to pay the intestate, as

Berry v. Doremus.

before stated, in consideration of board owing by Mead to her, the death of Mead, on the 5th of April, 1849, and the death of the intestate, on the 13th February, 1858.

The plaintiff thereupon rested; whereupon the defendant moved for a nonsuit, upon the following grounds:

1st. Because plaintiff had proved no promise to pay within six years.

2d. Because the action is to recover the arrears of an annuity, which cannot be created except by deed.

3d. Because it is an attempted testamentary disposition.

4th. Because it is an agreement to pay the debt of another, and not in writing, and void under the statute of frauds.

5th. Because it is an agreement not to be performed within one year, and not being reduced to writing, is void under the statute of frauds.

6th. Because it was an attempt to create a trust, and not being in writing is void by the statute of frauds.

The court granted the nonsuit, and certified the case to this court for their advisory opinion, whether the nonsuit was rightly granted upon any of the grounds above stated. We are not asked if the nonsuit was rightly granted generally, but whether it was rightly granted for the grounds stated.

As to the first ground taken, the statute of limitations does not commence to run until six years after the cause of action accrues. Here the cause of action only accrued at the end of each year after the death of Mead, and until the intestate died. Mead died in 1849, and the intestate in 1858, and this suit was brought in 1859. There are several years, therefore, which could not have been barred by the statute.

The second ground for nonsuit assigned is—because the action is brought to recover the arrears of an annuity, which cannot be created except by deed.

But the cause of action set forth in the declaration is not an annuity, nor does the proof show an annuity. The de-

Berry v. Doremus.

claration counts simply on a parol assumpsit. An annuity is an incorporeal hereditament created by grant, which necessarily implies an instrument under seal. *Coke Lit.* 166, *b.*

The plaintiff's claim is not for an annuity, within the technical meaning of the term, at all, but upon a simple assumpsit to pay. The doctrine of annuities has no application therefore to the case. The second ground assigned for a nonsuit therefore fails.

The third ground assigned for a nonsuit was, that the proceedings between these parties, Mead, the intestate, and the defendant, was an attempted testamentary disposition. But how so? It was not so, as regarded the intestate and the defendant; nor can I see how it was on the part of Mead. He owed the intestate, and it wanted no testamentary disposition to force him to pay his debts. He might pay her by any legal arrangement *inter vivos* that he saw fit. If he saw fit to sell real estate, and pay her out of the proceeds at any such time as suited himself, there was nothing testamentary about it. He might sell his house, and take pay on any terms of credit in his discretion. Suppose he had exacted from the purchaser a note payable to the intestate as part pay for the lot, there could be nothing testamentary or illegal in it. A note of hand by A. to pay B., after the death of C., is perfectly good, so far as anything testamentary about it is concerned.

The fourth ground assigned for granting the nonsuit was, because the agreement of the defendant was to pay the debt of another person, and not in writing, and so void under the statute of frauds. But this agreement of the defendant was evidently, not one to pay the debt of another. It was an agreement to pay his own debt. He, by taking the deed, became indebted to the grantor, and his agreement was to pay a part of his indebtedness to the grantor, to his order or appointee. It was the same, in legal effect, as agreeing to pay so much of the consideration of the deed to the grantor himself. By so doing he was not paying the debt of Mead, but his own debt to Mead.

Berry v. Doremus.

The fifth ground of demanding a non-suit was because the agreement was void under the statute of frauds, as it was not reduced to writing, and was an agreement not to be performed within a year. But here the contract on the part of Mead was actually and entirely performed, at the very time of making it. His deed was actually executed and delivered, and the defendant went immediately into possession under it, and always has been, and still is in possession of the premises under it, and always has, and still does receive the rents of the same under it. He now seeks to keep the land under the deed, and repudiate the consideration money by force of the statute of frauds. But the statute of frauds applies to no such case. It only applies to cases where neither side is to perform the contract within one year. At least it does not apply to cases where one of the parties is to perform, and does in fact perform immediately. 3 *Barn. & Ad.* 889, (23 *Eng. Com. Law* 217) *Donellan v. Read*; 7 *Taunt.* 157, *Hoby v. Roebuck*; 11 *East* 142, *Boydell v. Drummond*; 1 *Ld. Raym.* 316, *Smith v. Westall*; 1 *B. & A.* 722, *Bracegirdle v. Heald*; 3 *Burr.* 1278, *Fenton v. Emblers*; 11 *Metc.* 411;* 1 *South.* 145;† 2 *Denio* 87, *Broadwell v. Getman*; 2 *Parsons on Cont.* 319, note 2, and cases there cited; 13 *Barb.* 498;‡ 4 *Exch.* 631, *Cherry v. Heming*.

The sixth ground urged for a non-suit was, because it was an attempt to create a trust, and not being in writing, is void by the statute of frauds. But I cannot see what trust was here attempted to be created. It was an ordinary deed of bargain and sale for the consideration therein expressed. The defendant agreed to pay the consideration as the grantor prescribed. The grantee assents to the terms of payment, among which was the agreement to pay part of the consideration money to the intestate, in place of paying it to the grantor himself. There was no more trust created in agreeing to pay the intestate, than in agreeing to pay the grantor himself. There was no other trust than there always is between the vendor and vendee, when the vendee agrees to pay the consideration at a future time, or in the vendee

* *Lyon v. King.* † *Mannings v. Randolphs.* ‡ *Talmadge v. Rensselaer and Saratoga R. R. Co.*

State v. Donahay.

agreeing to pay the vendor for a pound of sugar the next day. The agreeing to pay part of the consideration to the intestate was the same, in legal effect, as agreeing to pay the grantor. The whole upshot of the matter was, that the defendant owed Mead for land sold, and agreed with Mead to pay part of the purchase money to his order, instead of to himself. There was no such trust as required to be in writing by the statute of frauds. I see no reason to grant a non-suit upon any of the grounds urged upon the Circuit Court, and think that the court should be advised accordingly.

OGDEN and VAN DYKE, Justices, concurred.

THE STATE, THOMAS WINSOR AND OTHERS, PROSECUTORS
v. JOSEPH DONAHAY, COLLECTOR OF THE TOWNSHIP
OF HOWELL.

1. On a *certiorari* to set aside an assessment imposed by a meeting of the taxable inhabitants of a school district, *Nix. Dig.* 780, the court will not decide the legal existence of such corporation, or the legality of the election or appointment of the persons who acted as trustees to incorporate the district.
2. The certificate of the trustees of the proceedings of a meeting to order money to be raised by taxation, need not set forth the places at which the notices of the meeting were set up; if in the words of the act, "in at least three public places in said district," it is sufficient.

On *certiorari*. In matter of assessment for schools in school district No. 6, in the township of Howell.

For the prosecutors, *A. C. McLean*.

For defendant, ————.

The opinion of the court was delivered by

ELMER, J. This *certiorari* is prosecuted to procure a reversal of the tax imposed by a meeting of the taxable in-

State v. Hallam.

habitants of West Farms school district, No. 6, held on the twenty-fourth day of May, 1862. The district, it appears, was incorporated by means of a certificate of three persons, acting as trustees, and the town superintendent, dated May 13th, filed and recorded on the same day. It is now objected that one of these trustees was not elected by the inhabitants of the district, but was appointed by the other two to fill a vacancy. This involves the question, whether the corporation had a legal existence, and cannot be tried in this collateral way. *State v. Van Winkle*, 1 *Dutcher* 73.

Another objection to the proceeding is, that the certificate, signed and sworn to by the trustees, and delivered to the assessor, does not set forth the places at which the notices of the meeting were set up, but only, in the words of the act, "in at least three public places in said district." This was, in my opinion, a sufficient compliance with the act, and brings the case within the decision of the Court of Errors in *Hardcastle v. The State*, 3 *Dutcher* 352. It is also shown, by the proof, at what places the notices were in fact set up, and that they were the three most public places in the district.

The assessment must be affirmed.

CITED in *State, ex rel. Mitchell, v. Tolan*, 4 *Vroom* 202.

THE STATE, THE GLOUCESTER MANUFACTURING CO.,
PROSECUTOR, v. THOMAS HALLAM, COLLECTOR, ETC.

1. Under the act of 1862, private corporations must be assessed at the full and actual value of their capital stock, and not on the full amount of their capital stock paid in.
2. The provisions of several apparently conflicting sections of the act, discussed.

On *certiorari* to review an assessment made against the property of the defendants, under the tax law of 1862, and to settle the true mode of valuation.

State v. Hallam.

For the prosecutor, *A. Browning*.

For the defendants, *P. L. Voorhees*.

The opinion of the court was delivered by

VAN DYKE, J. The plaintiffs are a corporation, chartered by the legislature of the state. By the affidavits, taken under the order of the court, and which are not controverted, it appears that their capital originally paid in was \$361,000, but through losses of various kinds, their works having been twice destroyed by fire, their stock has become reduced in value from \$25 per share to five dollars per share, which would reduce the value of the \$361,000 paid in to \$72,200, yet the assessor has assessed them on the sum of \$361,000, originally paid in, and not on the present actual value of their property; and whether this assessment on the full sum paid in is right or not, is the question for our consideration.

The assessment was evidently made in a supposed obedience to the directions of the 8th section of the act of March 28th, 1862, which enacts "that all private corporations of this state, except those which, by virtue of any irrevocable contracts in their charters, or other contracts with this state, are expressly exempted from taxation, shall be, and are hereby required to be respectively assessed and taxed at the full amount of their capital stock paid in and accumulated surplus."

If the act contained nothing else on the subject but this, however unreasonable and unjust it might seem, I would feel myself constrained to sustain the construction put upon it by the assessor. But to give the 8th section this construction, is to bring us into direct conflict with the language of the 7th section, which is quite as explicit and positive, far more controlling and far less dubious in its character, than the 8th section. The 6th section relates merely to a poll-tax, but the 7th section is the first one which defines and describes the kind of property which is liable to taxa-

State v. Hallam.

tion. Without entering into minute specifications of the objects of taxation, it lays down the broad, clear, and universal rule, which is eminently just, that *all* property within the state, of every kind and description, whether real or personal, and whether belonging to individuals or *corporations*, shall be liable to taxation subject to certain exemptions mentioned, and that this property shall be assessed at the *full and actual value* thereof. The section reads as follows: "That all real and personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation, in the manner, and subject to the exemptions herein after specified, and shall be assessed at the full and actual value thereof, at such rate per dollar as to raise," &c.

Now it is very manifest, in the case before us, that the assessor assessed the property of this corporation at its *full* value; but it is equally manifest that he did not assess it at its *actual* value, which is contrary to the clear intention and express language of the 7th section.

After passing over several sections, mostly containing directions as to the *mode and manner* in which the assessment is to be made, we reach the 14th section, which is the last on that subject, and in which the duties of the assessor in that respect seem to be summed up, adding the *tests* by which he is to ascertain the full and fair value of all the property, which he is required to assess under the act. That section enacts, "that it shall be the duty of the assessors, in assessing *any* property to be assessed under this act, to assess and value such property at its full and fair value, and at such price as in his judgment said property would sell for, at a fair and *bona fide* sale by private contract at the time such assessment is made; and every assessor shall annex to his duplicate an oath or affirmation, in writing, to be taken before any person authorized to administer an oath or affirmation, that all assessments in the said duplicate contained, have been made according to the requirements of this section."

Now this section not only requires each assessor to make every assessment which he makes under this act, according

State v. Hallam.

to the requirements of this 14th section, that is, to assess all property at its full and fair valuation, and at such price as in his judgment it would sell for, at a fair and *bona fide* sale by private contract, at the time of making the assessment; but it also requires him to add to them his oath or affirmation that he has so made them according to that section. But the assessor certainly did not assess this corporation or its property according to the directions and requirements of this section. He says himself, in his evidence, that he did not so assess it, but that he did assess it upon its capital stock paid in, irrespective of its market value, and that he did not stop to inquire whether it was above or below par. He obtained his information of the capital paid in of the officers of the company, and was informed by them of their condition and of the reduced and low condition of their stock, but made the assessment as he did because he deemed it his duty so to do. Now can it be supposed that the legislature ever intended to make such a hard and cruel distinction against poverty, and in favor of wealth, even among corporations themselves, as this construction of the assessor seems to claim.

Can we suppose that the legislature meant to tax one corporation, which still retains all its capital paid in, and has lost nothing, simply on the full amount of such capital, and at the same time to tax another corporation which has lost next to everything, on the same amount of paid in capital, on the ground that it had once owned it, but which, from accident by flood, or fire, or tempest, or other unavoidable cause, had long since been swept from existence?

The capital of a company may be reduced so low that to compel it to pay a single tax assessed on the whole amount paid in would exhaust every vestige of property that remained, and I do not see, if the construction contended for be correct, why the assessors are not required to search out every broken bank, and every bankrupt turnpike company, and every bankrupt mining and manufacturing company and railroad company which has been legally organized in the

State v. Hallam.

state, and not legally dissolved, and assess them at the full amount of their capital stock paid in; for it seems, according to this construction, that whether a corporation still possesses all the capital that was once paid in, or whether it possesses only a part of it, or whether it possesses *no* part of it, are questions about which the assessors have no right or power to inquire, but must simply assess it at its full amount of capital stock paid in, without regard to any other consideration whatever.

There may be corporations still doing business, whose paid in capitals are as thoroughly sunk and gone as those which have ceased to do business. Why should they not all be treated alike, and taxed either on their paid in capitals or not taxed at all? And if the assessor can inquire whether their capitals be wholly gone, why may he not inquire if they be but partly gone? for the question, whether a corporation is taxable or not, does not, it seems, depend on whether its paid in capital is still preserved or not, or only a part or none of it, but simply whether it is a corporation or not which once had a paid in capital. If it be, the assessor must assess it on the full amount of the capital so paid in. But I cannot suppose that any such intention was ever entertained by the legislature, or that we can put any such construction upon their acts.

I presume the legislature were sufficiently discriminating against partially exhausted corporations, as between them and individuals, when they permitted the latter to deduct their debts from the valuation of their taxable property, but refused it to the former, without taxing them for property which they did not own. Can we possibly suppose that the legislature ever intended to tax any persons, either natural or artificial, for property which they did not own? And yet this is precisely what the assessor has done in the case before us. He has taxed these plaintiffs with \$288,800 worth of property which they have not got, and which they do not own.

What, then, is the true interpretation of these three sec-

State v. Hallam.

tions, which at first view present some appearance of conflict? They seem to me to be quite consistent with each other, when properly read and understood. The 7th and 14th are entirely so, and the 8th effects in the end the same result precisely. All three tax property, though by a somewhat different process, exactly at its true and actual value. The 7th and 14th do so directly, by taxing *all the property* which corporations own; and the 8th, by taxing the paid in capital and surplus in that form, exactly reaches and taxes all the property which corporations of that class actually own, for their capitals and surplus embrace all the property which they can own. For this reason, I think the 8th section is quite unnecessary, as the same result would be reached, if the corporations mentioned in the 8th section were taxed according to the provisions of the 7th section.

The legislature, having abandoned the idea of taxing the stock of corporations in the hands of individual stockholders, have determined, instead, to reach and tax it in the hands of the corporations themselves. In the 7th section, it is called estate real and personal. In the 8th, it is termed capital stock, and in the 14th, the term property is used. But these expressions all mean the same thing. A corporation has no capital stock of any value, except what is represented by the property which it owns, either real or personal, and in the 7th section provision is made for taxing all their capital stock by taxing all their property, real and personal, and this provision would also extend to and include all their accumulated surplus; for accumulated surplus can only consist of the undivided profits which the company has earned or acquired, and still has on hand, and is necessarily embraced in the property of some kind which the corporation owns.

The 7th section, as already remarked, is sufficiently broad, as well as explicit, to cover all classes and cases of taxable corporations; but the legislature evidently supposed that the

State v. Hallam.

real amount and value of the property of those corporations whose capitals were still full and unimpaired, and especially if they had an accumulated surplus besides, could be much easier, as well as much more certainly reached, by taxing such capital and surplus directly and in that form, than by attempting to search out all the particular items and parcels of such property, wherever it might happen to be found; and they accordingly, in the 8th section, gave directions to the assessors, that in assessing all private corporations which still had their paid in capitals, and also an accumulated surplus, to assess them directly and at once on such capital and surplus.

But all this is neither inconsistent nor in conflict with the 7th and 14th sections, which require that all the property of corporations, as well as of individuals, shall be assessed at its full and actual value. The 8th section only prescribes the particular manner in which the property of a certain class of corporations shall be assessed, *viz.* by assessing their paid in capital and accumulated surplus.

But it does not apply to any other corporations. The section, in terms, only refers to those corporations which *have* a surplus. There can be no such thing as an accumulated surplus unless the paid in capital is kept good. The earnings and profits of a corporation must be used to meet its losses and expenses first, and if they do not do this and more, so that the assets and property show a balance over and above the paid in capital, there can be no surplus. The directions in the 8th section can only, and do only apply to such corporations as these. Hence the 7th and 14th are not disturbed by it.

It was quite useless, if not absurd, for the 7th and 14th sections to direct, that all the estate and property of corporations should be assessed at its full, fair, and actual value, if such assessments were all to be controlled by the 8th section; for, according to that section, if that is to prevail, their property is *not* assessed at its full, fair, and actual value; but

State v. Hallam.

the corporation, whose property is still worth all the capital that ever was paid in, is taxed just as much, and no more, as the corporation whose property and assets are reduced in value to next to nothing. I cannot admit the existence of such an absurdity in the act.

It appears very much as if the legislature, after having for a special reason introduced the 8th section, fearing that some misapprehension might arise, to remove all doubt, added the 14th section, thereby reaffirming the principles of the 7th section, furnishing the mode by which the assessor was to ascertain the true value of the property assessed, and requiring him to add his oath or affirmation that he had made all of his assessments according to the provision of the last named section. And yet the assessor, in the case before us, with these two sections in full view, has assessed these plaintiffs for \$366,000 worth of property, when it clearly appeared to him that they only owned \$72,200 worth. This, I think, was certainly wrong, and the assessment should be reduced.

The cases of *The Washington Manufacturing Company*, *The Kaighn's Point Ferry Company*, *The Camden Water Works Company*, *The West Jersey Ferry Company*, and *The Camden and Philadelphia Ferry Company*, were all argued at the same time, and are to be governed, it is agreed, by the same principles. The assessments in these cases, also, should be reduced.

VREDENBURGH, J., dissenting. This *certiorari* was brought to test the correctness of the tax assessed for the year 1862 upon the property of the prosecutor. The prosecutor is a private corporation, and its capital stock has been assessed at par. It is not denied that the actual value of the stock is not over seventy-five cents on the dollar. The prosecutor contends that the tax should be at the real, and not its par value; that the tax should be in proportion to value; or, in other words, on \$75,000, and not on \$100,000. This tax was

State v. Hallam.

assessed by virtue of the act of March 28th, 1862, *Pamph. Laws* 344.*

It is contended, on the part of the prosecutors, that the question is regulated by the 14th section of this act. This provides that it shall be the duty of the assessors, in assessing any property to be assessed under this act, to assess and value such property at its full and fair value, and at such price as, in his judgment, said property would sell for at a fair and *bona fide* sale by private contract at the time such assessment is made. The prosecutor contends that in this case this section has been disregarded, and that the assessor should only have taxed it at such price as in his judgment the capital stock would have sold for at private sale. The prosecutor further relies on the 7th section of the same act, which provides that all real and personal estate, whether owned by individuals or corporations, shall be assessed at the full and actual value thereof.

The defendant, however, justifies his assessment under the 8th section of the same act. This provides that all private corporations shall be and are hereby required to be respectively assessed and taxed at the full amount of their capital stock paid in and accumulated surplus, and the persons holding the capital stock of such corporations shall not be assessed therefor. It is apparent, if we construe this 8th section literally, that the tax is correct as it stands; for it says expressly that every private corporation shall be taxed at the full amount of its capital stock paid in. But the plaintiff in *certiorari* contends that this language is modified by that of the said 7th and 14th sections. I think not. I think the 8th section means precisely what it says. This will be manifest from the presumption that the legislature must be intended to mean what they plainly say. I do not see how its clear and explicit language can be subject to doubt. It says expressly, that "every private corporation shall be taxed at the full amount of its capital

* This opinion refers to the facts in the case of the Camden Water Works Company.

State v. Hallam.

stock paid in and accumulated surplus," and devotes two long sections, the 8th and 9th, to effect that object, and to make that very important change upon the law as it stood before. But the prosecutors contend that this 8th section taxes private corporations on their capital and accumulated surplus, and therefore applies only to corporations that have an accumulated surplus; that corporations whose stock is below par can have no surplus, and that therefore such corporations are not within the meaning of this section; that the section was intended to govern those corporations only which had an accumulated surplus. I cannot so think, for many reasons. In the first place, such is not the grammatical sense of the terms used. The language is, "all private corporations shall be taxed at the full amount of capital paid in and accumulated surplus." Now suppose there is no accumulated surplus, and the capital stock is taxed, is not the surplus also taxed? The surplus is nothing, and the tax on it is nothing, and the tax on the capital is as strict a compliance with the words of the act, if there is no surplus as if there is. But again, if private corporations which have no surplus be not within this 8th section, then neither such corporations nor the property they represent can be taxed at all; for this very section provides that the persons holding the capital stock shall not be assessed therefor, and no other section or law provides for taxes on corporations as such.

All the other sections relate to taxes on property only, which stock belonging to individuals is not, so far as corporations are concerned. Let us now take a more general view of this subject.

Before the act of 1854, *N. J. Dig.* 850, the general principle of taxation was to tax the individual for the visible property he had in possession, without deducting his debts. The great change introduced into this act of 1854 was to tax to the individual all property, real and personal, including stocks in corporations, in his possession, deducting his debts. One of the main objects of the act of 1862, under which this tax was levied, was to change his principle as to private

State v. Hallam.

corporations, and instead of taxing the individual for the stock he owned, which might be nothing after deducting either his own debts or the debts of the corporation, to tax the corporation itself by a special standard,—to tax the corporation itself, not for what its property was worth after deducting debts, but on its capital stock paid in and its accumulated surplus. This act of 1862 still preserves the principle of taxing individuals according to what they were worth by deducting their debts from their property, and placing the tax on the balance. But as regards private corporations, that was the precise principle the legislature meant to change by this act of 1862, and to tax corporations not for what they were worth, by first deducting their debts, but upon their whole capital paid in and accumulated surplus. This kind of tax was, in its essence, partly a capitation tax and partly a property tax; it was a capitation tax, regarding the corporation as an artificial person, so far as regards the tax on their capital stock paid in, and a property tax, so far as regards the accumulated surplus. To now tax a private corporation for what it is worth, or its stock at its value in the market, is but coming back again to the act of 1854, and repealing the act of 1862 by judicial construction. If this be not correct, why was the act of 1862 passed at all. Its effect, in this regard, is precisely like that of 1854; the only difference is, that in the one case the tax is paid by the individual stockholders, in the other by the treasurer of the corporation, but its amount and object are the same.

That this construction of the act of 1862 is correct appears from the whole structure of that act. Thus the act of 1862 preserves the great principle, which was the corner-stone of the act of 1854, which so altered our ancient tax laws, *viz.* that of taxing the individual for what he was worth; but it intended to change that whole principle as regarded private corporations, and apply an entirely different theory to the whole mass of private corporations in the state. No one can read its different sections, especially the 8th, 9th, 10th, 12th, and 13th, without being struck with the anxiety and

State v. Hallam.

determination with which the legislature are pursuing that object.

Let us now turn our attention again to the 8th section of this act of 1862.

As we have before remarked, if private corporations which have no surplus are not within its provisions, then, as there is no other section or law that taxes them, they cannot be taxed at all. But there are other difficulties connected with the matter. If the tax is to be, not upon the amount of capital paid in, but upon its value in the market, if there is a surplus it will probably be above par, and that in proportion to the amount of the surplus. What then? How, under the act, are we to tax it above par? or if we do, do we not, as we have to tax the surplus too, tax the same property twice over, first the surplus, and then the stock above par which represents it.

But again, the value of a stock in the market depends often, not so much on the value of the property it represents as upon the income it produces; and in the market would often bring \$150, when all the property of the corporation, if sold, would not bring twenty. This would be a tax not on property, but upon income, which there are no indications in the act, that the legislature intended.

But again, the value of a stock, for the most part, depends on the debts it owes. If \$100,000 are paid in, its stock is presumed to be worth par; if the debts are \$100,000, it is worth nothing.

Is there any pretence that, under this act, the assessors, in assessing private corporations, are to deduct debts of the corporations? Are not all the mandates of the act in the very teeth of such a procedure? When the legislature intend that debts shall be deducted from property, do they not, as in the 12th section, say so explicitly? And do they not pass the 8th and 9th sections for the express and only purpose of making that distinction between corporations and individuals?

But again, this great change which the legislature meant

State v. Hallam.

to make between individuals and corporations, by the act of 1862, is further manifest from the remaining clauses in its 8th section. There are many corporations in this state which have no capital stock. These clauses provide "that such corporations as have no capital stock, shall be assessed for the full amount of their property and valuable assets, without any deduction for debts or liabilities."

Here is the same distinction between the taxes of individuals and corporations. The individual is taxed for his property *after*, these corporations *before* deducting debts. Can it be possible that the legislature intended to make any such distinction between corporations which had, and those that had not capital stock, as to tax the one *free from*, the other *subject to* their debts?

That the intent of the 8th section is precisely what it says, is further manifest from the 9th and 13th sections. This 13th section provides that the real estate of private corporations shall be assessed to said corporations, and the amount deducted from the amount of the capital stock and surplus. Now, if the prosecutors are right, this real estate would have to be deducted, not from the amount of the capital stock, but from the amount of the market value of the stock.

But it is contended, by the prosecutors, that the construction comes in collision with the 7th section of the act. Our first answer is, if it does, the 8th section is subsequent to the 7th, and if both cannot stand, the 7th will have to yield. But secondly, we do not see any such collision. The 1st section of the act provides, that there shall be assessed on the inhabitants of this state, and on their taxable real and personal property, and upon the other objects of taxation herein after specified, a state tax. So that the 1st section recognizes three distinct objects of taxation: 1st, persons; 2d, property; 3d, other objects of taxation: and as private corporations are the only other objects of taxation named in the act, the legislature must have designated private corporations as an object of taxation distinct from natural persons and from property.

State v. Hallam.

The 1st object of taxation—natural persons—is satisfied by the poll-tax in the 6th section. The 2d object of taxation—property—is satisfied in the 7th section, which provides that all property shall be taxed in the manner and subject to the exemptions in the act specified. The 3d object of taxation, *viz.* private corporations, is satisfied by the 8th, 9th, and 10th sections providing for such taxation.

Nor does the 7th section collide at all with the 8th, 9th, and 10th sections. The 7th section provides, that all personal estate shall be liable to taxation, in the manner, and subject to the exemptions in the act specified, at the full and actual value thereof. Now the first property exempted in the act is the capital stock of private corporations held by individuals, but which capital stock is taxed in the manner prescribed in the 8th section, to wit, at par upon its capital paid in. The property of persons, consisting of stocks in private corporations, is by the 8th section taxed in this manner, to wit, by taxing it at its par value in the name of and to the corporations. It is to be taxed at its full and actual value in the manner specified in the act, and the manner specified in the act is at the full amount of the capital paid in. So that the 7th and 8th sections are in this regard in perfect accord.

It is next contended that this construction of the 8th section comes in collision with the 14th section of the same act. This 14th section provides that it shall be the duty of the assessors, in assessing any property to be assessed under this act, to assess and value such property at its full and fair value, and at such price as in his judgment said property would sell for at a fair and *bona fide* sale by private contract, at the time such assessment is made; and every assessor shall annex to his duplicate an oath, that all assessments in it have been made according to the requirements of this section. Now it could not have been intended, by the legislature, that the last clause of this section should be literally construed, for it is impossible that the assessments required by the 6th and 10th sections should be made according to the requirements of the 14th section. The legis-

State v. Hallam.

lature could only have intended, by the last clause of the section, that the oath of the assessor should cover all the duties required of him by the first clause of the section. When, therefore, the legislature required that the assessor should swear that, in assessing any property under this act, he valued such property at its true value, what property was in the eye of the legislature? Surely not the stock of private corporations in the hands of the stockholders, for that was free from taxation by the very terms of the act. Was it the capital stock of private corporations assessed as against the corporations? Certainly not, for two reasons.

First. Because the legislature had already, in the 7th section, provided a special manner of taxing that upon a different principle than its value; and it is against every principle of construing statutes, that when a special matter is specially provided for, it should be affected by a subsequent section embracing more general matters.

Secondly. Because the said 14th section speaks only of assessing property. Now the capital stock of a corporation in the hands of the stockholder is property, but in the hands of the corporation it is not. The capital stock of a corporation in the hands of the stockholders is no more the property of the corporation than is its circulation. It is the debt of the corporation, and the property of the stockholders. The assessor, therefore under this act, in assessing the corporation for its capital stock, is no more assessing property than he is assessing property when he is assessing a poll-tax. Let us test this a moment. If the capital stock of a corporation is property, and is to be assessed at its value, what is the assessor to assess it at? What is its value? The prosecutors say, what it will bring in market or at private sale. But what will the capital stock of a corporation bring in the market by virtue of an assessment against the corporation? It belongs to the stockholders, and not to the corporation. As the property of the corporation, it is obviously valueless. No value can be assigned to it as the property of the corporation. If sold as the property of the corporation, what

State v. Hallam.

could be got for it? What would the purchaser get? This 14th section does not therefore apply at all to this tax on the capital stock of corporations, but only to property of individuals and corporations, other than what is represented by the par value of their stock. This 14th section has relation only to the second object of taxation named in the first section of the act, *viz.* to tax on property, and not to the first and second objects of taxation therein named, to wit, natural persons and corporations or artificial persons. It is evident that the legislature, in dealing in this regard with corporations, was treating them as artificial persons, and intending the tax on them to be in the nature of a poll-tax. It is a tax on the poll, or head, or capital of the corporation; the capital being to the corporation what the poll or head is to the private individual. The capital is to the artificial person what the *caput* or poll is to the natural person. The prosecutors complain that this is unjust; that their stock has depreciated in value. But it is unjust only in the sense that every poll-tax is unjust. The head, poll, or *caput* of a bachelor is taxed at \$2, while that of a married man is taxed at only \$1. Is the *caput* of one double the value of the other? We can only say the legislature *sic voluit*; they have the power to do so, and have done so. There is nothing unusual in this principle of taxation. It was the universal one in this state prior to the act of 1854.

It is next urged that it is not to be presumed that the legislature would adopt any such arbitrary mode of taxation towards corporations. We are not quite so sure of that.

The increased taxation made necessary by the civil war forced the legislature to look around for additional objects of taxation. For popularity sake, they would naturally look around for matters of taxation that would occasion as little remark as possible. The increased taxation upon individuals would tend to excite clamor everywhere; the rich corporations had also power to resent unequal taxation, but the lame and sickly corporations were without much power to clamor or resent. They were without either friends or sympathy, and consequently the whole community would unite

State v. Hallam.

in the justice of any amount of taxation on them, however unequal. We are not therefore quite certain but that the legislature intended the precise thing which the prosecutors have with so much force and eloquence contended that they should be presumed not to have done. The particularity with which this case has been examined was due to the large interest involved.

CITED in *State, People's Fire Ins. Co., pros., v. Parker, Receiver*, 6 Vr. 580

THE STATE, THE WASHINGTON MANUFACTURING COMPANY, PROSECUTORS, v. THOMAS HALLAM, COLLECTOR.

On *certiorari*. In matter of taxation.

THE STATE, THE KAIGHN'S POINT FERRY COMPANY, PROSECUTORS, v. WILLIAM VANTIER, COLLECTOR.

On *certiorari*. In matter of taxation.

THE STATE, THE WEST JERSEY FERRY COMPANY, PROSECUTORS, v. SAMUEL I. RUDDEROW, COLLECTOR.

On *certiorari*. In matter of taxation.

THE STATE, THE CAMDEN AND PHILADELPHIA FERRY COMPANY, PROSECUTORS, v. JAMES H. DENNY, COLLECTOR.

On *certiorari*. In matter of taxation.

THE STATE, THE CAMDEN WATER WORKS COMPANY, PROSECUTORS, v. RUDDEROW, COLLECTOR.

On *certiorari*. In matter of taxation.

In the above cases the assessments to be reduced as in *The State v. Hallam*, ante 412.

For the prosecutors, *A. Browning*.

For the defendants, *J. M. Robeson* and *J. M. Scorel*.

State v. Drake.

THE STATE v. GEORGE M. DRAKE.

1. An indictment under the act of 1849, (*Nix. Dig.* 193, § 103,) for causing and procuring the miscarriage of a woman then pregnant with child, must charge that the defendant did the acts in the statute specified, with intent to cause *and* procure the miscarriage. Both words must be used conjunctively, in order to charge in the indictment the intent which the statute makes criminal.
 2. A charge in the indictment, that the defendant administered a certain poison, or drug, or medicine, or noxious thing, is bad, because it does not charge that he administered the whole of the prohibited things, nor any one of them.
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On *certiorari* to remove indictment for a misdemeanor.

The defendant was indicted at the Sussex Oyer and Terminer, in April term, 1863, for procuring the miscarriage of one C. L. V.

The indictment contained four counts.

The first count charged that the defendant, on the 13th August, 1862, at, &c., maliciously and without lawful justification, and with intent to cause the miscarriage of the said C., a single woman, who then and there was pregnant with child, did then and there administer unto her, the said C., a certain drug, medicine, or noxious thing, to the jurors unknown, and that the said C. did afterwards, to wit, on, &c., at, &c., die in consequence of the said administration of the said drug, medicine, or noxious thing so administered to her by the said defendant, contrary to the form of the statute, &c.

The second count charged that the said defendant, on, &c., at, &c., to one C., a single woman, who then and there was pregnant with child, with intent to procure the miscarriage of the said C., did prescribe for her, and advise and direct her to take and swallow a certain other poison, drug, medicine, or noxious thing, and that in consequence of her taking and swallowing the said poison, drug, medicine, or noxious thing she died.

State v. Drake.

The third count charged that the said defendant, with intent to procure the miscarriage of the said C., a certain instrument, to the jurors unknown, did there and then use, in consequence whereof she died.

The fourth count charged that a certain person, to the jurors unknown, in and upon the said C., &c., then and there maliciously, and without lawful justification, a certain other instrument or means, to the jurors unknown, did use, with intent to procure the miscarriage of the said C., and that the said C., in consequence of such use of the said instrument or means, did afterwards, &c., die, and that the said defendant did then and there, with the like intent to procure the miscarriage of the said C., aid and assist the aforesaid person in the said use of the said instrument or means, contrary to the form of the statute, &c.

The indictment having been removed into this court by *certiorari*, the counsel of the defendant moved to quash, on the ground that the same was vague and defective, and charged no specific crime.

For the motion, *R. Hamilton*.

The indictment is founded on the statute of March 1st, 1849. It is not sustainable at common law, because it is not alleged that the child was quick. *State v. Cooper*, 2 Zab. 52.

An indictment under the statute must contain all the ingredients given by the statute to make up the offence.

The counts are all insufficient.

First count.

1. This does not charge that the offence was committed with the intent to cause and procure the miscarriage, which is the language of the statute; but it charges it to have been committed simply with intent to cause it. The words are in the conjunctive, not the alternative. All the words which to go constitute the offence must be used. No case is to be brought by construction within a statute, while it falls

State v. Drake.

not within all its words. 1 *Bishop's Cr. Law*, § 134; *Whart.* 364, 5th edit.

So are the precedents. They charge the intent to be to cause and procure. 3 *Chit. Cr. L.* 797; *State v. Gibbons*, 1 *South.* 40-48; 1 *Whart. C. L.* 364, and notes.

2. It is not charged, in the language of the statute, that the poison was administered to her to take or swallow, and hence it does not meet the requirements of the statute.

The case of *The State v. Murphy*, 3 *Dutcher* 112, decided that it is not necessary to prove an actual taking or swallowing, but the offence consists in its being given for that purpose.

The allegation that the party afterwards died in consequence of the administering of the drug, does not cure the want of a positive averment. 1 *Chitty's C. L.* 231.

3. The count is insufficient in charging, in the alternative, a certain drug, medicine, or noxious thing.

The statute makes either an offence, yet it must be specifically charged which one was used, so that the defendant may be prepared to answer. 1 *Chit. C. L.* 231; *Whart. C. L.*, 5th edit., 285, § 2, and notes 3, 294, 295, 296, 299, to 304.

Second count.

This is subject to the first objection taken to the first count. The charge is, with intent to procure, instead of cause and procure. It is also in the disjunctive "that a certain other poison, drug, medicine, or noxious thing was prescribed," &c. 1 *Chit. C. L.* 231. It is faulty, also, in not stating positively that the thing prescribed was taken and swallowed. It is only stated argumentatively.

Third count.

In this count the death of C. is charged. The indictment charges that the defendant, a certain instrument unknown did upon one C. use, and in consequence thereof she died. It is not stated what kind of instrument, nor how or where it was used, or whether any injury was inflicted by the instrument, or that any injury received caused her death. These are necessary to enable the party to make defence.

State v. Drake.

Fourth count.

This charges that a certain person unknown, a certain instrument or means unknown did use with intent to procure the miscarriage of the said C., and in consequence of the use of such instrument or means she died; and that the defendant, with the like intent to produce, &c., did knowingly aid and assist in the use of said instrument or means. It is liable to most of the objections urged against the other counts, and cannot be sustained.

For the state, *contra*, C. S. Leport.

The opinion of the court was delivered by

VAN DYKE, J. This indictment is framed under the supplement of March 1st, 1849. So much of it as is material to this inquiry is as follows: "If any person or persons maliciously or without lawful justification, with intent to *cause* and *procure* the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing; and if any person or persons, maliciously and without lawful justification, shall use any instrument or means whatever with the like intent, and every person with the like intent, knowingly aiding and assisting such offender shall, on conviction," &c.

The indictment contains four counts, and the motion is made to quash the whole of them. They are all subject to the same objection. To make the transactions mentioned criminal under the statute, it is necessary that they should have been done with intent, to cause and procure the miscarriage of a woman then pregnant, &c. These words, *cause* and *procure*, are not used in any of the counts. They seem to have been purposely kept apart, for the word *cause* is used in the first count, and the word *procure* in each of the other three. This objection seems to me to be fatal, for it is the intent with which the thing is done that makes it criminal at all. That intent, to become criminal, must be to

State v. Drake.

cause and procure a miscarriage. The statute has not made the intent to cause or procure sufficient, which would have justified the use of either word alone; but it has connected the two together, and made a conjunction of both necessary to constitute the crime. If both words are not used, then the intent, which the statute makes criminal, is not charged in the indictment, and of course there is no crime charged. The only plausible answer that can be given to this objection is, that both words mean substantially the same thing, and therefore the use of both are not necessary. But the law has long since prohibited both courts and prosecutors, from speculating on the meaning of words used in creating penal statutes, either by instituting analogies or otherwise. The legislature has said that both words are necessary to constitute crime, and it is not for us to say that one is enough for the purpose. This would be making the law different from what the law making power has made it; and if we can do it in this case, in what case may we not do it; and if we may do so in this court, what court may not try the experiment; and if a prosecutor may lawfully omit one of the words which creates an offence, on the ground of its being analogous to another word already introduced, why may he not omit all the words which go to characterize the offence as criminal, and substitute other words which might be supposed to have about the same meaning. This, I apprehend, has never been permitted, and never should be.

The law on this subject seems to be very well settled. Bishop, in the first volume of his work on Criminal Law, § 134, lays down the rule broadly but positively. In speaking of penal statutes, he says, that "no case is to be brought by construction within the statute while it falls not within *all its words*. If a case is fully within the mischief to be remedied, if not within the words, construction will not be permitted to bring it within the statute." The doctrine thus enunciated is sustained by many cases there cited. It is sound and salutary, as well as safe, and should not be departed from. If we once admit such a practice in the

State v. Drake.

framing of indictments, there is no telling where it will end. We should not permit it to begin. No one can certainly tell what precise meaning the legislature intended to attach to those words which they have used. This principle is strongly sustained, moreover, in the case of *The State v. Gibbons*, 1 *South*. 40.

The first, second, and fourth counts are subject to another objection, quite as serious as the one just considered. The means or things made use of to produce the miscarriage are all charged disjunctively, that is to say, it is charged in substance in these counts, that the defendant did administer, &c., to the female a certain poison or drug or medicine or noxious thing to the jurors unknown. This must certainly be bad, for two reasons: first, it charges the defendant with nothing in direct and express terms. It does not charge that he administered the whole of the prohibited things, nor any one of them, but charges that he did one thing or another, or another, which can mean nothing; secondly, it does not apprize the defendant against what he is to defend himself. The inference from the language, as used, is not that he employed all the prohibited articles and means, but that he used some one of them, but which it was the grand jury did not know, and did not say, consequently they have left the defendant in as much doubt as they were themselves.

The law, on the subject of making these charges disjunctively instead of conjunctively, seems also very well settled. The rule is laid down in *Wharton's Crim. Law*, page 364, very explicitly, and it is sustained by numerous authorities, that the disjunctive form is not sufficient.

I think, therefore, that the indictment should be quashed.

Indictment quashed.

State v. Haight.

THE STATE, THE NEW YORK AND ERIE RAILROAD COMPANY AND NATHANIEL MARSH, PROSECUTORS, v. JOHN B. HAIGHT, COLLECTOR, ETC., FOR JERSEY CITY.

Ferry boats, owned by a foreign corporation, enrolled in the New York custom house, used for carrying freight and passengers between Jersey City and New York, and having no permanent location in Jersey City, are not liable to be taxed there; such property cannot be said to be *situate* in any township or ward.

Certiorari. In matter of taxation.

Certain ferry boats, owned by the New York and Erie Railroad Company, and plying between New York and Jersey City, were assessed by the authorities of Jersey City as property subject to taxation. It appeared they belonged to a foreign corporation, and were regularly enrolled in the custom house in New York.

The prosecutors sought to set aside the assessment, for the following reasons:

1. That the said ferry boats should be taxed in New York, and not in this state.

2. That they were taxed, during the period covered by the assessment now complained of, in the city of New York, and the tax was paid in that jurisdiction.

3. That said ferry boats were registered in the custom-house of the city of New York, and district of New York, being the district which comprehended the port to which the boats belonged, at the time of said assessment for tax, and have thence continued to be so registered.

4. That a valuation was not put on each boat, and the assessment is uncertain and void.

For the prosecutors, *I. W. Seudder*.

For the defendant, *R. D. McClelland*.

The opinion of the court was delivered by

VAN DYKE, J. The *certiorari* in this case brings up for

State v. Haight.

consideration an assessment and taxation, by the authorities of Jersey City, on the ferry boats of the New York and Erie Railway Company, which ply between New York and Jersey City. These boats are all owned by a corporation belonging to, and chartered by the state of New York. They are all enrolled in the custom house in the city of New York; and they are used for carrying passengers, freight, &c., between that city and Jersey City, some of which is of a local character; but most of their business, it is supposed, is in connection with the Erie railway itself. None of the boats appear to have been built in this state, nor to have any permanent location here, except that they lie at, and are fastened to the piers on this side, long enough to deliver and receive their passengers and freight, or to wait for their arrival, and in a few instances, one or more of them have remained on this side long enough to receive repairs.

Our act relative to taxes directs, that when the owner of personal property shall be a nonresident of this state, such property shall be taxed in the township or ward where the same may be *situate*; but I am unable to see how these steamboats can be considered as being *situated* in the state of New Jersey at all. The personal estate of foreign owners, to be so situated as to be subject to taxation within the meaning of the act, must have some permanent location here, for the time being at least. It cannot be, I think, that all the vessels belonging in other states, and owned by citizens thereof, visiting our shores, but never coming upon them daily and several times a day, and returning back again as often as they come, can be considered as *situated* here. The establishment of the principle contended for by the assessor in this case would seem to authorize him in assessing everything that he can find within his official limits at any time while making his assessments; which would render it unsafe for a stranger to our soil to visit it with his property during that time. The law does not contemplate any such thing. It is only intended to tax such personal property of foreigners, as is actually located or used within the state with some-

Stall v. Fulton.

thing like permanency, and not having its actual location or home somewhere else. These boats have no actual location or place of residence, so to speak, in this state; but they *have* a location and home in the state of New York, and cannot, I think, in any sense, be considered as belonging here as the objects of taxation by us.

I do not think it wise, either as a matter of comity or of policy, to press these border questions, when they contain any considerable amount of doubt. They are certainly calculated to provoke retaliatory proceedings on the other side; and if we may tax the ferry boats of the Erie company, I do not see why New York may not also tax the ferry boats of the New Jersey Railroad Company. One hostile act of the kind is quite likely to produce another, and in this way much bad feeling and bad neighborhood will be engendered. Friendly feeling and pleasant intercourse with our neighbors, and especially with our sister states, should by all means be cultivated, and all proceedings calculated to produce the contrary should be avoided, if possible.

I think, therefore, these assessments should be set aside.

Assessments set aside.

HERMAN STALL v. JOHN M. FULTON AND SUSAN HIS WIFE.

1. Under the 3d section of the act of March, 1852, *Nix. Dig.* 503, for the better securing the property of married women, a married woman can receive to her sole use a deed for lands for a term of years.
2. When such a deed expresses on its face that the consideration was paid by the wife, the presumption is that the consideration was her own money.
3. The creditors of the husband, under judgment and execution against him upon a cause of action arising anterior to the deed, cannot get a title at law, as against the wife, so as to maintain ejectment against the husband and wife, nor turn her out of possession. The whole legal title remains in the wife by force of the statute, even if the consideration money of the deed was the property of the husband.
4. The earnings of the wife, upon express promises to pay her, belong to

Stall v. Fulton.

her, and not to her husband, until he does some act with intent to reduce them into possession; and if he dies first, they survive to the wife; and if with such proceeds she buys land, and the deed is made to her before the conversion by the husband, the land belongs to her and cannot be seized and sold by his creditors under judgments against him.

5. The husband is not obliged, nor is he guilty of any fraud against creditors, if he does not convert to his or their use the earnings of the wife.
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Ejectment to recover twenty-four lots of land in the City of Elizabeth, in the county of Union. Issue having been joined, and the cause set down for trial, the parties agreed upon the following statement of facts, on which the case was afterwards argued before the court at bar.

This suit is brought to recover possession of twenty-four lots of land, in the City of Elizabeth, known as lots Nos. 1 to 24, both inclusive, on Block No. 34, as marked on a map of the new manufacturing town of Elizabeth Port, New Jersey.

At the date of the demise laid in the declaration, George Whitsell and John Atbridge occupied a portion of said premises, as tenants of John M. Fulton and Susan his wife, or as tenants of the wife alone.

The deed for the premises in question was given to Susan Fulton, the wife of John M. Fulton, and the estate thus held is a chattel real, being the unexpired portion of a term of thirty years, for which said premises had been legally sold for the nonpayment of taxes, by virtue of an act of the legislature, entitled "an act to make taxes a lien upon real estate in the township of Elizabeth, in the county of Essex, and to authorize the sale of the same for the payment thereof," approved February 11th, 1847.

In 1849, and before the said sale, the fee of the premises in question was in one Charles D. Robinson, and the term now held by Susan Fulton was created by a public sale of said premises, made by William Condell, a constable of the

Stall v. Fulton.

township of Elizabeth, by virtue of a tax warrant to Augustus Kellogg who became by said sale the purchaser of a term of thirty years (30) in said lots, in consideration of his paying the taxes assessed against them for which they were sold, and also the costs, fees, charges, and expenses attending the sale of said lots.

The term or estate thus created, was conveyed to said Augustus Kellogg by the deed of said William Condell, constable, bearing date March 15th, 1857, and was recorded in the clerk's office of the county of Essex, in Book O 7 of Deeds for said county, in page 343, and the sale to him by said Condell was regular and legal in form and substance.

By deed, dated September 26th, 1853, and recorded, February 1st, 1858, in the clerk's office of Union county, in Book No. 2 of Deeds, in pages 512, &c., the said Augustus Kellogg conveyed all his right, interest, and estate in said premises to Susan Fulton, wife of John M. Fulton, defendant in this suit, for the consideration of one hundred and fifty dollars. There was a written agreement, between Augustus Kellogg and John M. Fulton, respecting the purchase of Kellogg's interest and estate in the premises in question, signed by said Kellogg.

Since the conveyance to Mrs. Fulton, three buildings (residences) have been erected on said lot.

The consideration for the lots, and for the improvements subsequently put upon them, was furnished mainly from the proceeds of the labor and industry of Susan Fulton and her daughters (under twenty-one years of age), in connection with hired girls and apprentices; but, from 1858 to 1860, John M. Fulton assisted at the business in which his wife and daughters were engaged, which was manufacturing, and giving out to manufacture articles of clothing, chiefly vests; but, previously to 1858, his only connection with the business was in going to and from New York, bringing out and returning the work manufactured by his wife and daughters. From 1858 to 1860, in addition to going and returning from

Stall v. Fulton.

New York in taking charge of said work, he personally superintended the business at their place of residence in Elizabeth.

On the 19th day of July, 1859, the plaintiff recovered a judgment in the Supreme Court of New Jersey, against the said John M. Fulton, for \$1217.60 debt, and \$32.30 costs, founded on the record of a judgment, recovered against the said defendant by the said plaintiff, in the Supreme Court of the State of New York, in the county of Dutchess, June 19th, 1857, which said last named judgment was founded on a contract made prior to the purchase of the aforesaid lots.

By virtue of an execution, duly and regularly issued and recorded upon the first named judgment, the sheriff of the county of Union levied upon, advertised, and on the 24th day of August, 1860, sold at sheriff's sale, the estate and interest of John M. Fulton in the said premises to Herman Stall, the plaintiff in this suit, for the consideration of \$49; and a deed for the estate and interest of said John M. Fulton, dated August 24th, 1860, was by the said sheriff delivered to said Herman Stall, on the 31st day of August, 1860, and duly recorded in the clerk's office of Union county, in Book 7 of Deeds, pages 95, &c., on the 7th day of September, 1860.

If, upon the whole case, the Supreme Court think that judgment should be entered for the plaintiff, then it is agreed that judgment shall be entered for the plaintiff, and if for the defendants, then judgment shall be entered for the defendants.

WILLIAM F. DAY, *att'y of defendants.*

E. W. RUNYON, *att'y of plaintiff.*

For plaintiff, *M. Beasley.*

The premises in dispute were conveyed to Mr. Fulton by deed, dated September 26th, 1853, and recorded 1st July, 1858. One Augustus Kellogg made the conveyance, by virtue of an article of an agreement with Mr. F., the husband. The consideration of the lots, and the improvements subse-

Stall v. Fulton.

quently put upon them, was mainly the labor of wife and her infant daughters.

The plaintiff claims under sheriff's deed of 31st August, 1860, by virtue of a judgment against Fulton, the husband, obtained in the Supreme Court, 19th July, 1859. This judgment was founded on a judgment in New York, obtained 19th June, 1857, and which was upon a contract made prior to the purchase of the lots.

The subject matter of dispute is the term of years, which is a chattel real.

I. Chattels real vest in the husband. *Clancey's Husb. and Wife* 2; 2 *Kent's Com.* 134.

Husband may bar the interest of wife by assignment, with or without consideration. *Clancey* 104.

They have this peculiarity—they do not admit or stand in need of being reduced into possession; they are already in possession. *Ibid.* 104.

At common law, the property was liable to execution against husband. The only question is, is the property protected under our statute respecting the property of married women. *Nix. Dig.* 503, acts of 1852.

II. What is the construction of the act?

Its design is to protect the property of married women. It is not to enable them to take property, which before the passage of the act the law prevented them from holding.

It is a remedial statute. The old law permitted the husband and his creditors to take the property of the wife. This was the evil; the remedy is to protect that property for her.

III. This statute can have no application to this case.

The attempt here is to secure the property of the husband to the use of the wife.

The act secures hers—this application would secure his.

This term is the husband's property.

Every dollar which went to pay for the land and for the buildings was his.

The earnings of the wife belong to him absolutely.

Stall v. Fulton.

The statute has not altered the law in this respect. *Clancey's Husb. and Wife* 3; 1 *Parsons on Cont.* 286.

They must be sued for in the name of husband alone. *Ibid.*

So completely are her earnings his property, that he cannot give them to her as against creditors. 2 *Story's Eq. Jurisp.*, § 1387.

At the time of the gift in this case, this debt had been incurred.

A debt is void as against existing debts at time of gift. 1 *Am. Lead. Cas.* 40, *Sexton v. Wheaton*.

The same construction is given in Mississippi. 30 *Miss.* 589, *Sharp v. Maxwell*; 27 *Miss.* 830, *Henderson v. Warmach*.

For defendant, *B. Williamson*.

The opinion of the court was delivered by

VREDENBURGH, J. This ejectment is brought to recover possession of 24 lots in the City of Elizabeth. The plaintiff claims title, by virtue of a judgment, on a cause of action arising before the deed to Mrs. Fulton, herein after mentioned, against the husband, and a deed under such judgment, dated the 31st of August, 1860. This (the defendants being in possession), *prima facie*, entitles the plaintiff to recover.

The wife sets up, by way of defence, a deed to her from the former owner, dated the 26th of September, 1853, for a term of thirty years. But at the common law this would vest in the husband during their joint lives, and thus far be liable for his debts. *Clancey's Husb. and Wife* 9, 10.

But the wife, in further defence, sets up the act of the legislature, passed on the 25th of March, 1852, *Nix. Dig.* 503.* The deed to the wife is dated a year after this act went into effect, and while she was a married woman. It is therefore affected by its provisions. The 3d section of this act provides, "that it shall be lawful for any married female to receive, by gift, grant, devise, or bequest, and hold to her

**Rev.*, p. 636.

Stall v. Fulton.

sole and separate use, as if she were a single female, real and personal property, and the rents, issues, and profits thereof; and the same shall not be subject to the disposal of her husband, nor be liable for his debts."

It was decided by this court, in the case of *Ross v. Adams*, 4 *Dutcher* 160, that the term grant, in the act, included this species of conveyance. This case, then, is that of a married woman receiving a term of years by grant, and the statute says, in terms, that it shall not be liable for her husband's debts.

This, therefore, is a complete defence, unless the plaintiff can show that it is outside of the provisions of this statute. The plaintiff attempts to do so, by alleging that this term of years was paid for with the husband's money, and that on that account the statute does not operate on the grant, and that the title passes through the wife to the husband the same as it would at common law, and as if this statute had never been passed.

In the first place—suppose the wife did pay for this land with the money of her husband, so as to defraud his creditors, how does it affect the question at law? Can the plaintiff maintain ejectment, or is his remedy in a court of equity? By the common law, the title flows from the vendor to the wife, and through her to her husband. The husband gets no title from the vendor. All the title he gets is what flows through the wife to him.

The statute does not prevent the title passing from the vendor to the wife: the whole title passes out of the vendor into the wife, the same as if no statute had been passed. The statute only operates on the title when it reaches the wife. It then immediately attaches to the title in the wife's hands, and stops its further passage. The channel by which it passed at common law from the wife to the husband is hermetically sealed by the statute. The statute says the wife may receive and hold it to her separate use as a single female; and that it shall not be subject to the disposal of her husband, nor be liable for his debts. The channel

Stall v. Fulton.

through which, therefore, the plaintiff claims that the husband got his title, is blocked up by the statute. It could get no further than the wife.

The common law, under which a joint estate for life in chattels real of the wife were vested in the husband, was repealed by the statute. The title therefore passed from the vendor to the wife by virtue of the deed, and the statute prevents it going any further.

Nor can the fact of the wife's paying for the land with the funds of her husband make any difference as to the legal title. The only remedy of the creditors is in equity. At most they can hold only an equitable title. We have been referred to some cases in Pennsylvania, where ejectments have been sustained for chattels real bought by the wife with the husband's money; but these were under their local practice—they having no Court of Chancery; and ejectment is there used in the nature of a bill in equity to execute a trust.

But suppose we are wrong in this, it remains to be considered whether the case here shows that this term of years was in point of fact bought with the husband's money. Upon the face of the deed it appears to have been bought with the money of the wife, and not of the husband.

It is said, in reply, that at law, when a deed is made to a married woman, the presumption, *prima facie*, is that it was bought with the funds of the husband. This doctrine would disturb a great deal of property in New Jersey. It is the constant habit to make deeds and all kinds of securities to married women, paid for by funds they have earned or received from kindred, and which have remained thus in their own names all the rest of their lives. In all such cases can a creditor sell under a judgment against the husband, bring ejectment against the wife's heirs, and say that the presumption is that the lands were bought with the husband's money, and put them to the proof, in the first instance, that it was not, or turn them out of possession by ejectment?

We are referred to several cases in Pennsylvania where the court use very strong and general words to that effect.

Stall v. Fulton.

Such are the cases of *Keeney v. Good*, 9 *Harris* 354; *Bradford's appeal*, 5 *Casey* 513; *Gamber v. Gamber*, 6 *Harris* 366; *Topley v. Topley*, 7 *Casey* 328; and of *Aubles v. Mason*, 11 *Casey* 261. But these are all cases where the other facts in evidence show very plainly, that the funds were in fact the husband's, and not the wife's, and the expressions of the court should be read in the light of all the facts appearing in each case.

The presumption upon the face of the deed is, that the term of years was bought with the funds of the wife, and the burthen of overcoming this presumption is upon the plaintiff.

The question before us therefore is, whether the plaintiff has shown, by his case, that this money was her husband's. He has shown us, in the state of the case, the facts connected with these funds, and insists that, in point of law, they were the husband's. These facts are, that the consideration of the deed to the wife was \$150; that this \$150 was the proceeds of the labor and industry of his wife and minor daughters in manufacturing vests, and that his only connection with the business was in going to and from New York, bringing out and returning the work manufactured by his wife and daughters. Now does this statement show that the consideration of this deed to the wife was the property of the husband? It appears to me, so far from doing so, that it shows the reverse, and that this consideration was the property of the wife, or of the wife and daughters jointly.

The plaintiff contends that these facts show that the proceeds of this labor of the wife and daughters were the property of the husband. This raises two questions.

First. To whom were the promises made to pay for this work? Did those in New York, for whom these vests were made, promise to pay the husband or the wife for it? If they promised to pay the wife, whose property were the earnings—the husband's or the wife's?

It appears, by the case, that the labor done by the wife and daughters was the making up of vests for people in New York, from stuff sent by them to the wife and daughters in

Stall v. Fulton.

Elizabeth. The persons who owned the stuff must have agreed to pay somebody for the work; they must have agreed to pay either the husband or the wife. In the absence of all proof, the presumption of law would probably be that they agreed to pay the husband. But here is a *case*. Whom does the *case* show they must have agreed to pay? The case says, that the work was done by the wife and daughters for the persons who owned the materials in New York. It further says, that the husband *had no connection with the business, except* in going to and from New York, bringing out and returning the work manufactured by his wife and daughters. The case therefore shows upon its face expressly, *that the husband had nothing to do with the agreement to pay for the labor, express or implied*; that no promise was made by those who got the work done to pay *him*. This the case could not have said if the promise had been, either express or implied, to pay the husband. His going to and from New York with the articles manufactured, no more implies a promise to pay *him*, than it does to pay the baggage wagon or the railroad car in which they are carried. The case therefore negatives any promise, express or implied, to pay the husband. We must necessarily imply, from the case, that the owners of the raw material expressly promised to pay those who did the work, *viz.* the wife and daughters. We can therefore only understand the case as averring, that those who got these vests made undertook expressly to pay the wife and daughters for them.

This brings us to the second question, *viz.* If the promises of the owners of the raw material were to pay the wife and daughters for this work, whose property were these earnings at the date of the deed? Were they the husband's or the wife's?

The plaintiff contends that they were the husband's and refers us for authority to the general principle laid down in *Clancey's Husband and Wife*, p. 3, "that the husband is entitled to all sums of money which the wife earns by her skill and labor absolutely and in his own right." But the author

Stall v. Fulton.

is here speaking only of those earnings which have been made upon express or implied assumpsits to the husband, and is not speaking of express assumpsits to the wife. This author himself, on the following pages, most emphatically negatives any such conclusion to be drawn from his general language, and states clearly, as the result of the authorities, that the right of the husband to the earnings of the wife, upon express assumpsits to pay her, are only conditional, and that they belong to the wife until the husband reduces them into possession, and if he dies first, that they survive to the wife.

It is a principle of the common law, established in the earliest times, and kept up by a uniform current of decisions to the present, and recognized in all the elementary writers, that the right of the husband in the earnings of the wife, upon express assumpsit to pay *her*, is only conditional, and the right to such earnings remains in the wife until the husband reduces them actually into possession; that the earnings of the wife, after express promises to pay her, are choses in action—as much so as a bond or note of hand given to her during her coverture, and her property until reduced into the possession of the husband. Why not? They are the proceeds of the sweat of her own brow, and hers by a more sacred law than what descends from father or mother. Why not hers? As each day's toil is over, she has a right of action to enforce its payment against him who promises to pay her, as much as if he had given her for it a promissory note.

As the wife did each job of work, the debt due her from her employer was a chose in action belong to her, and which remained in her until her husband saw fit to reduce it into his own possession. That the earnings of the wife, upon express assumpsits to her, belong to her until the husband reduces them into possession, is supported by the most ample authority. *Clancey's Husband and Wife*, 3, 4, 5, and 6; *Brashford v. Buckingham*, Cro. Jac. 77—205; *Prat et ux. v. Taylor*, Cro. Eliz. 61; *Weller v. Baker*, 2 Wilson 414; *Buckley v. Collier*, 1 Salk. 114; *Fountain and Wife v. Smith*, 2 Sid.

Stall v. Fulton.

128; *Bac. Ab., Baron and Feme, R.*, § 20, 21; *Vin. Ab., Baron and Feme, T.*, § 32.

The next question is—did the husband reduce these choses in action of the wife's into his possession before this deed was made to the wife?

They existed originally in the shape of choses in action, that is, in the shape of express promises to pay the wife for her work. There is no proof in the case that the husband ever did, or intended to reduce them into possession. On the contrary, the case expressly negatives that idea. Whether the husband reduced them into possession, was a fact that should have been directly found for the plaintiff: it was a fact upon which his title rested. The presumption is, that these earnings remained in their original shape of choses in action. The case says the lands were paid for from the proceeds of the wife's labor. These proceeds were promises to pay her, and which we are to presume, from the case, were turned over to her vendor without ever passing through or under the control of the husband.

It is a well settled principle of law, that where the husband does not reduce the choses in action of his wife into his actual possession, by collecting or disposing of them, and does not act *with intent* to reduce them into his actual possession, their payment, even to the wife, with intent to reinvest them, will not vest the right to them in the husband. Whether they vest in the husband or not upon payment, even to the wife, depends upon the intent with which the payment is made. 18 *Ohio* 115; * 3 *How. U. S.* 624; † 12 *Smed. & M.* 369; ‡ 3 *Kelly (G)* 550; § 37 *N. Hamp.* 146, || 437; 22 *N. Hamp.* 352; ¶ 6 *Mees. & Welsby* 423; ** 28 *Vermont* 765; †† 30 *Vermont* 213; ‡‡ 32 *Vermont* 27. §§

The case here shows no fact or intent by the husband to make such a conversion, but every presumption is against it. It

* *Dixon's Adm'r v. Dixon.* † *Price v. Sessions.* ‡ *Comstock v. Rayford.* § *Sayre v. Flournoy.* || *Hall v. Young.* ¶ *Coffin v. Morril.* ** *Gaters, Ex'r, v. Madeley.* †† *Heirs of Holmes v. Adm'r of Holmes.* ‡‡ *Stearns v. Adm'r of Stearns.* §§ *Richardson's Adm'r v. Merrill.*

Stall v. Fulton.

appears, by the case, that these earnings remained in the shape of choses in action of the wife; of promises to pay her until these choses were passed over by her to her vendor in payment of this deed, and were, when so used, the property of the wife, and not of the husband. He had not yet done what it was necessary for him to do before any right to them vested in him. He had not yet performed the condition precedent upon which his right to these earnings depended. He had not reduced them into his own possession. This term of years, then, was bought with her own property, which under the statute she had a right to receive by grant; and the title to this term of years passed by the deed to her, and the statute stopped any portion of the title from passing through her to her husband.

Nor is there any law, human or Divine, that compels the husband, in the interest of his creditors, to convert to their use the daily labor of his wife, or to convict him of fraud towards them, if he permits her to toil at the wash-tub or the sewing machine to feed her own children, or to provide a shelter for her little ones from the night and the tempest. He may do so, if he chooses, but the law compels him not. If it did—if the law compelled the husband, for the benefit of creditors, to snatch the loaf of bread, the proceeds of her daily toil, as she is carrying it to her children, then, indeed, should mankind blush in the presence of the rest of the animal creation. The fishhawk does not rob his mate, as she carries in her talons to her nest the prey she has plunged beneath the ocean wave to seize. Throughout all the orders of animated nature, it is the prerogative of the female to labor for her young—the human male alone is brute enough to plunder her.

Judgment for defendants.

CITED in *Peterson and wife v. Malford*, 7 Vroom 487, 488; *Quidort's Adm'r v. Peterson*, 3 C. E. Gr. 479.

CASES DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW JERSEY,
AT FEBRUARY TERM, 1864.

THE STATE, THE JERSEY CITY AND BERGEN POINT PLANK
ROAD COMPANY, PROSECUTORS, v. JOHN B. HAIGHT, COL-
LECTOR.

1. A plank road company is in fact a turnpike company within the meaning of the tax law of 1854, (*Nic. Dig.* 851, § 64,)* requiring "the personal estate of such company to be assessed in the township or ward in which the treasurer or other officer authorized to discharge the general pecuniary obligations of such company resides."
2. A plank road constructed by a private company and under legislative authority, and dedicated to public travel, with gates erected thereon for the collection of tolls, as a condition of such travel, may properly be termed a turnpike road, without regard to the material of which the surface of the road may be composed.

On *certiorari*. In matter of taxation.

In 1862, the prosecutors were assessed in Jersey City upon the amount of their capital stock. After a reduction, made by the commissioners of appeal, the amount of tax was \$138.74.

The prosecutors seek to set aside this assessment, alleging that the whole of their capital stock is assessed and taxed in

**Rev.*, p. 1153, § 66.

State v. Haight.

Jersey City, while only a small part of their road, not exceeding one-fourteenth part of it, is situate in said city, the remainder being situate in the town of Bergen, and township of Bayonne; that the company had no office or place of business in Jersey City; that the tolls were all collected at toll houses outside the city; that only one of the directors lived in the city, and all the other directors, together with the treasurer, lived in another township. The prosecutors insist that their road is to be taken as a turn-pike road, and to be taxed upon the same principle, under the act of 1854, and therefore cannot be taxed in Jersey City, but must be taxed in the township or ward where the treasurer resides.

Witnesses were examined by both parties, under an order of the court, in reference to the facts alleged.

For the prosecutors, *A. O. Zabriskie*.

For the defendant, *R. D. McClelland*.

The opinion of the court was delivered by

VAN DYKE, J. The road in question is some eight miles in length. Less than half a mile of this is in Jersey City, the remainder all being in the other townships. All the toll gates and toll houses of the company are in such other townships, and all their tolls are there collected, no part of them being collected in Jersey City. The president, who is one of the directors, resides in Jersey City. The other five directors reside in Bergen. The treasurer and secretary, being the same person, resides in Bergen, but has a law office in Jersey City, at which a considerable portion of the general business of the company is transacted, but the meetings sometimes occur at other places, the company having no office or place of business of their own in that city. Jersey City, however, has assessed and taxed this company on the full amount of their paid in capital, on the ground, as it is supposed, of that being the township or ward where the

State v. Haight.

company have their principal office, or as the one where the operations of the company are carried on. But the company, by their writ of *certiorari*, appeal from this assessment, and ask to have it set aside, on the ground that Jersey City has no right to tax them at all.

The same section in the act of 1854, which directs that the personal property of corporations shall be assessed where their principal office shall be, or if they have none, then where the operations of the company are carried on, proceeds further to enact, that where the tolls of any bridge, turnpike, railroad, or canal company are collected in the several townships or wards, the personal estate of such company shall be assessed in the township or ward in which the treasurer or other officer authorized to discharge the general pecuniary obligations of said company resides.

All the tolls of this road, as we have seen, are collected in other townships than Jersey City. By the charter, all the toll gates are to be elsewhere, and the treasurer of the company resides in Bergen. If then, this road can be considered a turnpike road, I think, under the provisions of the act of 1854, last referred to, this company cannot be taxed in Jersey City, but must be taxed in Bergen township, where its treasurer resides. It is a matter of much importance to the company whether they are taxed in the one place or the other.

Is, then, this road a turnpike road, and is this company in fact a turnpike company, within the meaning of the act? The act only mentions by name, bridge, turnpike, railroad, and canal companies. The companies in the state usually known as plank road companies are not mentioned by that name, although this and other companies of the kind existed at the time of the passage of the law, and were well known as toll taking companies. It would seem, therefore, that the legislature either intended to except them from all toll receiving companies, or to class them under the denomination of turnpike company. A turnpike company is one that owns, and receives tolls on a turnpike road. Why is a road

State v. Haight.

termed a *turnpike* road? Not because of its form, or of the material of which it is composed, but because of the form and character of the gates placed on the road to obstruct the passage of travellers, until they have paid the tolls always collected on such roads. The word *turnpike* does not mean road, but it means gate, such as are used to throw across the road, to obstruct travellers' carriages and the like, until the tolls are collected. This is the definition of the word given by Webster, Richardson, and Worcester.

The charters usually granted to what are commonly termed *turnpike* companies and those granted to plank road companies, with regard to their duties, powers, and privileges, are substantially the same. Their right to erect gates and receive tolls is precisely the same, as is also the mode of using them. The only perceptible difference between the two, is the material of which the surface is usually composed. But it is believed that, whether the surface be earth or stone, or gravel or wood, if they are constructed by a private company under public authority, dedicated to public travel, with gates erected thereon and tolls collected, as a condition of such travel, such companies are *turnpike* companies, whether the surface of the road be earth, gravel, stone, or wood. The only difference between the road in question and what are generally known as *turnpike* roads being, that it has wood for its surface, instead of earth or gravel. I think it falls legitimately under the designation of a *turnpike* road, and the company owning it may properly be termed a *turnpike* company, and that the legislature intended so to treat them in the act, directing the manner and place where such companies should be assessed.

The road under consideration, then, lying in different townships or wards, with all its gates erected, and all its tolls collected, as by the charter they are required to be, outside of Jersey City, and as the treasurer and secretary of the company reside in the township of Bergen, I think that is the place, and the only place where the company can be legally taxed. If the evidence were sufficient to justify us

State v. Haight.

in concluding that the principal office of this company is in Jersey City, I would hold that to be the place where its personal property should be taxed: or if there were no provision in the statute for taxing this kind of corporation, where no principal office could be readily found, so that such company might avoid taxation altogether, I should be much inclined to hold very slight evidence of the existence of a principal office, sufficient to fix the place of taxation. But as no such necessity exists in this case, and as the law has made provision for assessing this class of corporations, the operations of which are carried on in different townships or wards, where no principal office exists in the township where the treasurer resides, I think we are bound to adopt these provisions in the case before us, especially as I find no evidence of the existence of an office in Jersey City any more entitled to be called their principal office, nor so much so as their several toll houses, where they have always officers stationed, and where all their moneys are collected. I think, therefore, that this assessment by Jersey City should be set aside.

Assessment set aside.

THE STATE, THE JERSEY CITY AND BERGEN RAILROAD
COMPANY, PROSECUTORS, v. JAMES B. HAIGHT, COL-
LECTOR.

1. A railroad company, furnishing their own conveyances, carrying nothing but passengers, and charging a certain price as fare, cannot be considered a toll collecting company.
 2. The personal property of such company should be taxed in the township or ward where the principal business of such company is transacted.
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On *certiorari*. In matter of taxation.

The prosecutors, having been taxed in Jersey City, in 1862, the sum of \$1246 on their capital stock, stated in the assessment to be \$150,000, brought this *certiorari* to set aside the assessment as erroneous—first, because their capital stock is

State v. Haight.

exempt from tax by law ; second, because they are taxed upon the whole amount of their capital stock in Jersey City, when the whole or greater part of their road is not situate within the said city, and when the whole or greater part of their stockholders do not reside there, and their principal place of business or depot is in the town of Bergen.

For the prosecutors, *A. O. Zubriskie*.

For the defendant, *R. D. McClelland*.

The opinion of the court was delivered by

VAN DYKE, J. The object of the *certiorari* in this case is to set aside the tax assessed against the company by Jersey City.

I am not able to see any good reason for an entire reversal of this assessment. The case does not come within the legal provisions adopted in the case of the Jersey City and Bergen Point Plankroad Company, decided at the present term. It is not a turnpike company in any sense, nor is it a railroad company which collects its tolls in different townships and wards. It cannot be fairly said to collect tolls at all. Tolls are collected from persons who pass or travel by their own conveyances over the roads or bridges of another. None do this on the road of the prosecutors. The prosecutors furnish their own conveyances, and carry nothing but passengers or persons, and charge them a certain price for being carried, known as fare. But if this company is to be considered as a toll collecting company, it has no treasurer, or other financial officer, authorized to discharge its general pecuniary obligations, residing in any other township or ward in the state than Jersey City.

In that city all its general and business meetings are held. There its president and secretary reside and have their offices, so far as they have any, and there is also their treasurer's office, although the treasurer himself is not a resident of this state. It seems to me, therefore, that Jersey City, and there only, is the proper and legal place for the taxation

State v. Smith.

of its personal property, which, under the act of 1862, means its capital stock actually paid in, if it still has it, and its accumulated surplus, if any there be.

But the company in this case is assessed on a paid in capital of \$150,000, whereas it appears by the evidence of the treasurer, unquestioned by any one, that the whole amount of the capital paid in is but \$63,000.

I think, therefore, that the assessment should be affirmed, except that the amount should be reduced to conform to the amount of capital actually paid in.

Assessment affirmed.

THE STATE, ALLEN, PROSECUTOR, v. SMITH, COLLECTOR
OF THE TOWNSHIP OF RARITAN.

1. The mere marking of a tax duplicate as an exhibit does not make it competent evidence of the contents; there must be some extrinsic proof of its genuineness.
2. A tax complained of as illegal will not be set aside as illegal, unless there is other proof of the facts necessary to show in what the illegality consisted, beside the prosecutor's *ex parte* affidavit upon which the *certiorari* was allowed.

This was a *certiorari* in a tax case, and was argued before Justices HAINES and ELMER, by G. A. Allen, for the prosecutor, and M. Beasley, for defendant.

The opinion of the court was delivered by

ELMER, J. The prosecutor of this *certiorari* complains that he has been illegally assessed, in addition to the sums authorized by law, for his share of a sum voted by special town meeting, illegally convened, to be paid as bounty for volunteers, and for a sum assessed for losses and incidentals. Had he shown, by competent evidence, that his complaint is well founded, he would be entitled to relief, it being very certain that the town meeting, even if properly convened, had no legal authority to raise money for either of those purposes.

State v. Smith.

But there is no legal evidence before us by which it appears that any such assessment was made.

The prosecutor was himself examined as a witness, and it appears he produced a book, which purports to be the tax duplicate for the year 1862, which was marked as an exhibit. This book, however, was not in any way authenticated as a genuine document. The prosecutor did not himself undertake to identify it, nor was the assessor or collector produced for that purpose; nor was it proved, in any way, how the prosecutor's tax was made up.

It was argued, by counsel, that the evidence necessary to show that the prosecutor was in fact taxed for a part of the bounty, appears in several ways.

First. By the affidavit of the prosecutor, upon which the *certiorari* was allowed. This was an *ex parte* affidavit, and cannot now be used as proof of anything contained in it; if it could be, there would have been no necessity to make any other proof.

Secondly. It was urged that the court allowed a rule staying the collection of so much of the tax as was alleged to be illegal; but this was allowed on the faith of the *ex parte* affidavit, and proves nothing.

Thirdly. The directions of the court, that he should pay all the assessment but that complained of; but this also depends on the aforesaid affidavit.

Fourthly. The collector's return to the *certiorari*; but this return contained nothing but the tax assessed against the prosecutor, regular on its face, and not the whole duplicate, nor any part of it, but that tax alone, nor was it proper that it should.

The fifth and main argument for the prosecutor was, that the duplicate produced before the commissioner, and by him marked as an exhibit, required no further identification. In my opinion, this argument is not tenable. All exhibits, except such as prove themselves, like duly certified records and acknowledged deeds, require other proof of their genuineness before they can be received as competent evidence.

State v. Smith.

In the case of *The State v. Cake*, 4 Zab. 517, to which we are referred, and which was a *certiorari* in a road case, upon the hearing of which, copies of the surveyors' oaths, certified by the clerk of the Common Pleas were produced, which the court rejected as not competent, it was remarked, that the clerk might have been ruled to send up the original papers for inspection, or which is the better practice, sworn copies might have been produced. But it is because neither of these things was done in this case, that the duplicate is not properly before us. It does not in any way appear that the book alleged to be the duplicate came from the custody of the township officers.

It was argued that the duplicate is a public document, which proves itself, and we are referred to 1 *Stark. Ev.* 157, 160, and 1 *Greenl. Ev.*, § 483, and the cases there cited, as authority for this proposition. An examination of the cases and the language of the text writers will show that what is meant is, that documents of a public nature, such as parish registers, tax duplicates, &c., prove themselves good evidence of the facts stated in them. Starkie says, page 182, "the document must always be proved to be that which it purports to be, and for which it is offered, by some extrinsic proof." This, indeed, is so obvious that no express authority would be necessary. A deed more than thirty years old, is said to prove itself; but there must be evidence that it came from a proper depository, or that possession had been held under it, before it can be received as being in fact what it purports to be.

It is highly probable that the document produced is in truth what it purports to be, and the same may be said of the certified copies of the oaths produced in the case of *The State v. Cake*. But courts must adhere to the well established rules of evidence, which are quite as applicable in tax cases as in any others. If it has been through inadvertence that the requisite proof of the illegality complained of has not been produced in this case; the party to whom it is chargeable must bear the loss.

State v. Johnson.

It may be proper to remark, that the collector who had the custody of the duplicate was not bound, and indeed ought not to place it out of his custody and control by allowing it to be made an exhibit without the express order of the court. The proper course was to make a copy of such part of it as was required, and prove it to be correct by his oath.

The prosecutor's tax, not being shown to be illegal, must be affirmed.

Tax affirmed.

THE STATE, WARNE, PROSECUTOR, v. JOHNSON, THE COLLECTOR OF WASHINGTON TOWNSHIP.

1. The 12th section of the tax law of 1862 repeals those parts of the act of 1854 which relate to mortgages, so that all personal estate, including all debts secured by mortgage, is to be taxed.
 2. To entitle a tax payer to have the debts he owes deducted, he must have an affidavit made out and delivered to the assessor before the time limited by law for closing the assessment roll. The assessor is not bound to do it for him. If neglected, the commissioners of appeal may waive it, and make the deduction; but if they decline to do so, the court will not set aside the tax.
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This was a *certiorari* in a tax case, and was argued before Justices ELMER and VAN DYKE, by *J. M. Sherrerd*, for the prosecutor, and *J. Vliet*, for the township.

The opinion of the court was delivered by

ELMER, J. That part of the tax against the prosecutor, called in the duplicate "the war fund," assessed by direction of the township committee, in pursuance of a vote of a meeting of the inhabitants of the township, not even professing to be convened as a regular town meeting, is clearly erroneous, and must be set aside.

As to the tax against Warne as trustee, from which a deduction is claimed on account of certain debts due upon mortgages against the real estate, it must be affirmed as it stands. Mr. Warne states, in his testimony, that the as-

State v. Johnson.

assessor asked him if he was aware of the law being altered, and that there must be an affidavit made of the amount of debts to have a deduction, and that upon his asking the assessor to draw it up for him, he said he had not time, but that at a future time he would do it, and that shortly after Mr. Warne again saw the assessor, and he said he had not time to do it.

The 12th section of the act of 1862 concerning taxes enacts, that in making the valuation of the real and personal estate, for which any individual shall be assessed by virtue of this act, it shall be lawful for the assessor, or for the commissioners of appeal in cases of taxation, to deduct from such valuation the amount of any debt or debts *bona fide* due and owing from such individual to creditors residing within this state, provided that in case of real estate, the holder of such debt shall reside in the same county where such real estate lies, and every assessor shall require every person claiming an exemption from tax on account of any debt or debts owing by him, to make a true statement, under oath, of such debts and the amount thereof, and deliver the same to the assessor, on or before the time limited by law for closing his assessment roll, which statement shall be filed with the township clerk. This section, in connection with other parts of the act of 1862, is inconsistent with those parts of the act of 1854 which relate to mortgages, and virtually repeals them; so that now all the estate of the taxpayer, including all debts due to him, either secured by mortgage or otherwise, is to be taxed, deducting only such debts as he owes to creditors residing within this state; and in case he owes more than the value of his real estate, then deducting therefrom such debts, not deducted from the personalty, as he owes to creditors residing in the same county in which the real estate lies.

According to the strict language of the aforesaid 12th section, the taxpayer's affidavit of the debts he claims to have deducted must be delivered to the assessor before the time limited by law for closing his assessment roll, in this case the 20th day of August.

Perrine v. Serrell.

The assessor is not bound to draw it for him, unless he has the leisure, and chooses to do so. Mr. Warne never presented an affidavit, but relied on the assessor drawing it for him.

But inasmuch as the commissioners of appeal have the power to make deductions, it is insisted that the affidavit might be presented to them, and that the prosecutor was prevented from doing this by the commissioners having neglected to meet. There is, however, no proper evidence that they did not meet. The act fixes no time in the day for the meeting, and although Mr. Warne testifies he attended at the proper time and place, and did not find them, it appears that he stayed, at the latest, only until one o'clock, and there is no negative evidence that they did not convene during the business hours of the day. In the absence of such evidence, we must presume they did meet. And if it had been shown that in fact, there was no meeting of the commissioners on the day fixed by law, this fact would not, in my opinion, entitle him to relief from the court. As he did not absolutely refuse to be sworn, so as to debar a right of appeal, I think the commissioners, if satisfied that he had been prevented from making the affidavit by a misunderstanding, might have received his affidavit, and granted him relief, yet they were not strictly bound to do so; and if by his negligence he, or the person he represents, has suffered loss, this court is not called on to aid him.

CITED in *State, Vail's Ex'rs, pros., v. Runyon*, 12 *Vroom* 103.

JOHN D. PERRINE v. JAMES E. SERRELL.

1. Under a warranty that a horse is sound and kind, and that if he should not suit, the seller would take him back, and send the purchaser another, *held* that the warranty as to unsoundness was independent, and that the right to provide another horse under the contract did not extend to unsoundness: that the horse being unsound, and having died, the purchaser could recover damages, and was not obliged to call upon the seller to furnish another horse.

Perrine v. Serrell.

2. The measure of damages in such case is the difference between the horse, if sound, as he actually was. Expenses paid by the plaintiff in delivering the horse in New York to be allowed.
 3. When the seller contracts to send a horse to the purchaser in New York, to be paid for when received in the city, the risk of the horse is upon the seller until the horse is delivered in New York.
 4. When an exception is general as to the law upon a particular part of the judge's charge, and the assignment is also general, all the testimony necessary to support the legal proposition will be presumed to have been before the jury.
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The case came up on a writ of error to the Monmouth Circuit Court.

The reason assigned for reversal of the judgment, and the facts relied on in support of them, are set forth in the opinion of the court.

For the plaintiff, *J. D. Bedle* and *M. Beasley*.

For the defendant, *A. C. McLean*.

OGDEN, J. The action below was for the recovery of damages for a breach of warranty contained in a contract for the sale of a horse.

A verdict was rendered in favor of the plaintiff below, and judgment entered thereon.

The first error assigned is, that the court refused to non-suit the plaintiff below because, as alleged by the plaintiff in error, the sale was not absolute touching the warranty, but that Perrine had a right to furnish another horse in place of the one which was the subject of the sale. The whole contract was made in writing, by letters passing between them, the seller living in Freehold, the buyer living in New York. The plaintiff, after looking at the animal, called "the Bashaw colt," in Freehold, returned to the city, and on the 21st of January, 1861, wrote to Perrine as follows:

"The end of this week, or the beginning of next, if you will please write me word what day you will send the Bashaw

Perrine v. Serrell.

colt (price as spoken \$200, and warrant it sound in all respects) up by the boat, I will be there with my horse which can return by the boat on the same day. I will also send you one hundred dollars on account, and you to allow me what is just for my horse; and if on trial the horse suits, I will pay the balance, or if not you are to get me such horse as will suit."

On the 23d of January, the defendant replied by letter, as follows:

"I received yours of the 21st, stating you would like me to send you the Bashaw colt. I will do so, and warrant him sound and kind. If he does not suit you, I will take him back and send you one that will. I will send him up on Saturday morning. Please have your horse to send back by my man. The price of this colt is \$200. Send your check for \$100,—your horse I will allow you all he is worth. When I see you all things I think will be satisfactory. I make it my business to make it so."

"P. S. The horse will come up with 'the Keyport' from Keyport, N. J."

On the 26th January, Perrine sent the horse to New York in charge of one Shepherd, his employee, together with the following letter:

"We send to-day the black colt as agreed to—you will please enclose the money or check in an envelope, and remit it by the bearer, Edward Shepherd, and much oblige

Yours resp'ty,

JOHN D. PERRINE, by
D. M. Reed."

The horse was received by the plaintiff in New York, and he sent his own horse to the defendant by Shepherd, with the following letter:

"Jan'y 26, 1851.

Herewith I send you a certified check for \$100, payable to your order, which can be drawn in any of your banks, on account of Bashaw colt, as agreed by letters which have passed between us." Then adding some characteristics of his own horse.

Perrine v. Serrell.

Perrine received the horse and check through his agent, Shepherd. It did not appear that any valuation was fixed by either party, then or at any other time, upon the plaintiff's horse, nor was there any testimony of his value offered at the trial. On the afternoon of the day on which the colt was sent to the city, he coughed considerably. He was well taken care of and nursed. He grew worse from day to day, and in a month afterwards died from inflammation of the trachea and lungs.

It was contended by Perrine in support of the first error assigned, that by the terms of the contract, the right to provide another horse extended to unsoundness; that it was a part of the warranty, and that the plaintiff could not recover damages until he proved that he had called upon Perrine to furnish another horse, and that Perrine had refused to do so.

This is not the true construction of the contract. The warranty, as to soundness, was complete and independent of the undertaking, that if the horse did not suit he might be returned, and another which would suit might be furnished in his place. The defendant below could not have warranted that the horse would suit. This was not a subject matter of warranty, because it might depend upon the taste of the plaintiff, as to gait, style, speed, &c. It did not refer to unexisting quality or condition of the animal. The plaintiff below could not have fulfilled the terms upon which he was entitled to call for another horse, because the colt died upon his hands from a disease, which the jury found existed when the contract of sale and purchase was made. If the horse had been sound, from aught that appears in this case, he might have suited the plaintiff in all respects contemplated in the condition.

Again, the plaintiff might immediately on delivery have resold the horse in good faith before the malady of which he died had developed itself, with his warranty of soundness, and have thus deprived himself of the ability to make return; but in such case, if he became liable for damages on his warranty, could it have been said that he could not have

Perrine v. Serrell.

fallen back upon the defendant because he did not first offer to return the horse? There is nothing in the terms of the contract which prevented the plaintiff from treating the warranty as extending only to soundness and kindness.

Another error assigned is, that the court erred in instructing the jury that the risk of the horse was upon Perrine until he was delivered in New York.

I think that the letters sustain the court in that position. The plaintiff was not to pay until the colt was received in the city. If a creditor of the plaintiff had attached the animal within the jurisdiction of this state, could the process have held him against the defendant as the owner? Or if the defendant had gone with the horse to New York, and sold him to a third party there, could the plaintiff have maintained trover for him against the purchaser?

The trial by Serrell, which was to precede the purchase, was to be made in New York, and within a reasonable time; hence the title and ownership must have continued in the defendant until a fair opportunity was offered for making the trial. It appears, in the case, that the plaintiff, after receiving the horse, drove him several times without complaining of his qualities; and from the evidence, it is fair to assume that he would have been satisfied, if a serious unsoundness had not have been discovered. It is not the case of an absolute sale made at Keyport, with possession remaining in the seller merely as a lien, or to secure the payment of the purchase money.

Another error assigned is, that the judge instructed the jury, that their verdict could in no way depend upon the value of the plaintiff's horse.

How could the value of that horse enter into the question of damages? Serrell was to give \$200 for the colt. He paid \$100 in cash, in New York, and at the same time passed his own horse over to Perrine, at what he might be worth, on account of the balance. The defendant never informed the plaintiff of his estimate of the value of the horse sent to him. If he would not at the time fetch enough to make up

Perrine v. Serrell.

the full price of \$200, Perrine had his action against Serrell for the balance. There was no error in this instruction of the court.

The defendant also excepted to the following part of the charge: "The measure of damages of the plaintiff, is the difference between the horse, if sound and as he was; and you shall also allow the plaintiff the expenses of doctoring the horse."

The rule, as to the measure of damages, was correctly stated, and has been well established. What other sensible rule could be adopted for the guidance of a jury?

Although the price was \$200, yet if it satisfactorily appeared by the proofs, that had he have been sound he would have been worth \$300, upon what principle should the plaintiff be deprived of the benefit of the increased value?

The last error relates to the charge respecting the expenses incurred by the plaintiff in doctoring the horse in New York.

The judge told the jury that such expenses should be allowed. The proof is, that Serrell paid twenty dollars to a veterinarian. It was not contended that the charge was unreasonable; why should it not have been allowed? It was a liability incurred by Serrell on account of the false warranty, and done for the benefit of the defendant. Serrell was bound to have the animal properly cared for, at the cost of the warrantor, until he should come and take him under his own charge.

The exception was general upon the law of that part of the charge, and the assignment of error is also general.

In such a case all the testimony necessary to support the legal proposition enunciated, is presumed to have been before the jury. If the defendant intended to object to the charge because the evidence of notice was not sufficient, he should have stated his point distinctly to the judge, and have called upon him so to instruct the jury. The attention of the judge would then have been directed to the point; and if the case had required it, he might have qualified the charge in that particular. As the bill stands, we must take the exceptions

Aycrigg's Ex'rs v. New York and Erie Railroad.

to have been to the right of the plaintiff to such an allowance by a jury under any circumstances.

It is necessary for the protection of a judge, in the haste of a trial at circuit, that a general exception of this character should be taken most strongly against the plaintiff in error, that all necessary presumptions and intendments should be made in support of a judgment. In 3 *Green* 276,* the court said: "If a party wishes to have the opinion of the court upon the legality of a charge, he should put his finger on the matter objected to, and state the reasons."

It does not appear that the attention of the judge was called to the reason, urged in the argument before this court, why his charge is alleged to be erroneous; so that if in error, he might have corrected it, and have obviated the objection.

A party should not be permitted to surprise his adversary, nor be allowed here, for the first time, to raise a point which might have been corrected if distinctly made in the court below. As said by the Court of Errors and Appeals, in the case of *Oliver v. Phelps*,† "without such restraint, bills of exceptions would be but traps to surprise and mislead an adversary, and not a means for the attainment of justice."

The judgment below should be affirmed.

Judgment affirmed.

VREDENBURGH, J., concurred.

CITED in *D. L. & W. R. R. Co. v. Dailey*, 8 *Vroom* 528.

AYCRIGG'S EXECUTORS v. THE NEW YORK AND ERIE RAILROAD COMPANY.

1. A master is liable to answer in a civil suit for the tortious acts of his servant, if the act be done in the course of his employment in his master's service, or within the scope of his authority; whether so done or not, must depend upon the facts of each particular case.
2. What acts of the captain of a ferry boat may be considered as not being in the course of his employment.
3. The rule which should govern the court on a motion to nonsuit, discussed.

* *Ludlam v. Broderick*. † *Spencer* 180.

Aycrigg's Ex'rs v. New York and Erie Railroad.

On rule to show cause why a nonsuit should not be set aside.

For the plaintiff, *A. S. Pennington*.

For the defendant, *I. W. Scudder*.

HAINES, J. This action was brought to recover the damages alleged to have been sustained from the burning of the yacht *Astrea*, of the plaintiffs, by the negligence and misconduct of the defendants, on the first day of August, 1862.

The motion now is to set aside a nonsuit granted at the Hudson Circuit. This leads to the consideration of the rule which should govern a court on a motion to nonsuit. In the case of *The Central Railroad Company* against *Moore*, 4 Zab. 830, the Court of Errors and Appeals decided the rule in terms quite explicit, and that rule must govern this case. It was there said, that the province of the court and that of the jury are quite different and distinct: of the one to declare the law, and the other to settle the facts. If the facts, clearly settled or uncontroverted, present a case in which the plaintiff is not entitled to recover, it is the duty of the court to nonsuit; or if the case made be such that the court would set aside a verdict against the defendant, as contrary to evidence, the plaintiff should be called. In so doing, the court acts strictly within its province, and declares the law arising from the clearly settled and uncontroverted facts. But if the facts be controverted, or not manifest, it is the duty of the judge to submit them to the jury, under proper instructions, thus leaving to that branch of the court the exercise of its peculiar functions, and affording to the parties the right of trial by jury, which the constitution has declared shall remain inviolate.

Then the question arises, whether the facts in this case were clearly settled and uncontroverted. Does the testimony show beyond question that, at the time of the injury complained of, the person in command of the steamer of the defendants was not acting within the scope of his au-

Ayerigg's Ex'rs v. New York and Erie Railroad.

thority? not in the course of the business of his employment? Whether he was or not is the question to be determined.

By the testimony, it appears that the *Astrea* was anchored on the flats near Jersey City. The barge *Poughkeepsie*, lying at the wharf of the defendants, on the Jersey side of the river, took fire. She went out of the dock, but how or by what means does not appear. Being out, she was carried by the wind and tide beyond the *Astrea*. Then the steamer *Hudson*, a ferry boat employed by the defendants to carry passengers and freight between their wharves on each side of the river, went down the river out of her usual course, and fastened to the barge, and towed her up the stream to within about a hundred feet of the *Astrea*. At the same time with the cry of some persons on the wharf and elsewhere, the hawser connecting the steamer to the barge was cut or parted, and the barge being again loose floated against the yacht, set fire to and greatly damaged her. The judge holding that there was not sufficient evidence to charge the defendants with the negligence of their agents, granted the motion to nonsuit. The simple question now to be answered is, was that ruling correct?

There is, perhaps, no rule of law more firmly settled than that a master is ordinarily liable to answer, in a civil suit, for tortious act of his servant, if the act be done in the course of his employment in his master's service. This is on the principle of the maxim *respondet superior*, and also of the maxim "*qui facit per alium facit per se*." The master is liable, although he did not authorize or even know of the servant's act or negligence, and although he disapproved of or forbade it, if the act was done in the course of the servant's employment, or, as it is sometimes expressed, within the scope of his authority.

The term "within the regular department of the servant," as used by Littledale, J., in *Rimell v. Sampayo*, 1 *Car. & P.* 255, is applicable rather to matters of contract than of torts, as where a servant, acting in his particular department of

Aycrigg's Ex'rs v. New York and Erie Railroad.

business, contracted a debt for which the master was held liable. In that case a coachman who had agreed, for a proper consideration, to find horses, hired a pair of horses for his employer's use; and it was held that the owner of the horses having no notice of the private contract between the coachman and the master, could hold the master liable for the hire of the horses. The servant appearing in the master's livery, and hiring the horses for his master's use, "was acting within his regular department of business."

Whether the servant was acting within the scope of his employment and in pursuance of his master's orders—whether in the course of his employments, or on his own responsibility, in the pursuit of his own business or pleasure, must depend upon the facts of each case. It is difficult to fix any general rule to govern every particular case. The numerous authorities on the subject are quite uniform on the principle of law involved, yet vary in its application according to the various circumstances under which the supposed injury arose.

It was held, for example, in *Middleton v. Fowler*, 1 Salk. 282, and in many subsequent cases, that a master is not responsible for the wrongful act of his servant, unless done in the execution of the authority from his master. And in another case it is said, that beyond the scope of his employment, he is as much a stranger to his master as to a third person. *Russell v. Early*, 13 Alabama R. 131. In *Joel v. Morrison*, 6 Car. & Pay. 501, it was ruled that a master was liable for damages caused by the negligent driving of his cart in the city by his servant, although it was proved that, in carrying out his orders, the cart ought not to have been in the city at all; and Parke, B., said: "If the servant, being on his master's business, make a detour to call upon a friend, the master will be liable." Again, in *Sleath v. Wilson*, 9 Car. & Pay. 607, the master was held responsible for damages caused by the negligent driving of his servant, who, after setting his master down, drove round to deliver a parcel of his own, and did not drive directly where he was ordered to go; and Ers-

Ayerigg's Ex'rs v. New York and Erie Railroad.

kine, J., declared, that whenever the master has intrusted his servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it.

In this case it is manifest that the captain was in charge of the steamer, with the control of it when in motion and crossing the river, with the general direction to ply between the wharves of the defendants. But the time of starting on each trip, of putting the boat in motion, was under the direction of an agent of the defendants. And the steamer was to leave the dock only on his signal. He testifies that he gave no instruction for the Hudson to go after the barge, nor to have it cut off. It does not appear that the Hudson was on her trip across the river, and made a detour in pursuit of the barge, nor that any signal for starting had been given. If no such order was given, the steamer was not then under the control of the captain by authority of the company. It was no more so than a coach and horses are under the control of the driver while in the stable or standing at the door awaiting orders. For aught that appears, the captain may, of his own will, and for his own purpose of benevolence or profit, have moved out of the slip and gone in pursuit of the barge. If so, upon the principles above stated, he was not on the business of his employers, but was as much a stranger to the company as to any third person.

It may well be questioned whether, if the commander of the steamer was acting in the course of his employment and under the implied command of the company, the defendants are liable. The burning barge was moving under the forces of the wind and tide towards the wharves and shipping below, threatening destruction to a large amount of property. The steamer, to prevent so great a calamity, seized the barge and towed her up the stream. When it was no longer safe to continue the connection, the hawser was severed, and the barge left to float. On the principle of inevitable necessity, the owners of the steamer would perhaps be exculpated from responsibility, in the absence of proof either of carelessness or willfulness on the part of the commander. I can see no

Nevius v. Martin.

evidence sufficient to justify a recovery. Had it been left to the jury, and a verdict found for the plaintiffs, we would have been obliged to set it aside as a verdict without sufficient evidence. I think the rule to show cause should be vacated.

Rule to show cause discharged.

OGDEN and VREDENBURGH, Justices, concurred.

CITED in *New Jersey Express Co. v. Nichols*, 4 Vroom 439.

PETER NEVIUS v. JULIANNA MARTIN ET AL.

1. A devise of "one acre of land joining the road leading from Metuchen to Bonhamptown on the west, and my house lot on the east"—*held*, that the house lot was only descriptive of one of the boundaries of the one acre lot, and that the house lot did not pass by such devise.
 2. If there be no latent ambiguity, the construction of a will must be drawn from the words, and parol testimony cannot be admitted to supply, contradict, enlarge, or vary the words, or to explain the intention of the testator.
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In ejectment. Error to the Circuit Court of the county of Middlesex.

David P. Martin, in and by his last will and testament, devised (among other things) as follows: "*Item*. After the death of my said wife, I give and bequeath to my nephew, Peter Nevius, one acre of land joining the road leading from Metuchen to Bonhamptown on the west, and my house lot on the east. But if said Peter Nevius should die before the age of twenty-one years, I give said lot to his brother, John Nevius."

The wife of the testator having died, and Peter Nevius having attained the age of twenty-one years, brought this action to recover the lot, called in the above devise the house lot, containing about 14½ acres, claiming to be entitled to it as devisee, under a proper and just construction of said devise. Upon the trial, after reading the will in evidence, he offered to prove, by the scrivener who drew the will, that by

Nevius v. Martin.

the instruction given to him by the testator at the time of writing the will, he was directed to devise the lot in question, containing about fourteen acres, to the plaintiff in fee—and that, by the language of the will, he believed that such intent was expressed.

This evidence was objected to and overruled. And the court, being of opinion that the plaintiff had made no title to the premises under the will, directed him to be called. To these several rulings of the court the plaintiff excepted, and a bill of exceptions was sealed. The case now comes up upon a writ of error, and the question presented is, whether, in the judgment and proceedings of the court below, there is error.

For the plaintiff, *W. H. Leupp*.

For the defendant, *H. V. Speer*.

HAINES, J. The plaintiff, claiming to be the devisee of two lots of land, one containing one acre, and the other about fourteen acres, in the county of Middlesex, under the will of David P. Martin, deceased, brought his action of ejectment, for the recovery of the fourteen acre lot, in the Circuit Court of that county.

The language of the clause of the will under which he claims is as follows: "*Item*. I give and bequeath to my nephew, Peter Nevius, one acre of land, joining the road leading from Metuchen to Bonhamptown, on the west; and my house lot on the east; but if the said Peter Nevius should die before the age of twenty-one, I give the said lot to his brother, John Nevius."

It is admitted that the testator, at the date of the will, owned a lot of about one acre, which he purchased of Jonathan Acken and wife, adjoining the road leading from Metuchen to Bonhamptown on the west, and, also, his house lot on the east; that when conveyed to the testator, it was separated by fence from the house lot; but after the purchase, the fence was suffered to go down, and at the death of

Nevius v. Martin.

the testator, and for some time before, there was no fence between the one acre lot and the house lot; that the house lot was that on which the testator lived, lying east of the one acre lot, and contained fourteen acres and over.

The plaintiff offered to prove, by the person who wrote the will, and was a subscribing witness to it, that by the instructions given to the witness by the testator, at the time of writing the will, he was directed to devise the lot in question, containing about fourteen acres, to the plaintiff in fee; and that, by the language of the will, he believed that such intent was expressed.

The testimony so offered was overruled by the court, and that ruling having been excepted to, is assigned for error.

On the part of the plaintiff, it is insisted that the evidence should have been received on the ground of a mistake in the will, to show that the scrivener did not use proper language to express the intention of the testator.

I know of no rule of law, nor any adjudged case, on which parol testimony has been or can be received to correct a mistake in a will. By law, wills to pass real estate must be in writing, signed and published by the testator in the presence of witnesses; and it would be inconsistent with that law to permit parol proof to be introduced to contradict, add to, or explain their contents. This principle requires an inflexible adherence to it, even if the consequence should be a partial, or even total failure of the testator's intention.

The formalities so carefully provided would be of no value; the statute itself would be virtually repealed, if when the written instrument is supposed not to express the clear intention of the testator, the deficiency may be supplied, and its mistakes corrected by extrinsic evidence. No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by judges, of early and of later times as well, with a cordiality and steadiness, which shows how entirely it coincided with their own views. 1 *Jarman on Wills* 349.

Nevius v. Martin.

A firm adherence to the rule is necessary to avoid the consequences of the misapprehension of the witness, and the danger of offering temptation to perjury. This very case is a fair example of the hazard of such testimony, where a witness is supposed to remember accurately in eighteen hundred and sixty, the verbal instructions received from the testator in eighteen hundred and forty-two.

The authorities on the subject are numerous, and all concurring.

It will suffice to refer to a single representative case, which is regarded as a leading authority. In *Brown v. Schwein*, *Cas. Temp. Talbot* 210, found also in *Bro. Parl. cases* 607, the testator, having bequeathed the residue of his personal estate to two persons, whom he appointed his executors, and one of whom was indebted to him by bond, it was attempted to be proved, by the evidence of the person who drew the will, that he received written instructions to release the bond debt by the will, but that he refused to do so, under the impression that the appointment of the obligor to be one of the executors extinguished the debt. Lord Talbot held the evidence to be inadmissible, and his decree was affirmed in the House of Lords.

To the same effect will be found many English cases. And *Mann v. Mann*, 14 *Johns. R.* 1; *Jackson v. Sill*, 11 *Johns. R.* 201; *Tucker v. The Seamen's Aid Society*, 7 *Metc.* 189; *Hand v. Hoffman*, 3 *Halst.* 71, are fair examples of the American cases.

But it is further insisted that the testimony was admissible to show or to remove an ambiguity.

If so, it must be a latent ambiguity, one which does not appear on the face of the will, but lies hidden in the person or thing or subject of which it treats. No parol evidence or evidence *dehors* can be received, unless it be to show a latent ambiguity, or to remove one. The *ambiguitas patens* raise no question for a jury or for the aid of witnesses, but is one of pure legal construction for the court. *Hand v. Hoffman*, 3 *Halst. R.* 78; *Den v. Cubberly*, 7 *Halst. R.* 308.

Nevius v. Martin.

Is there a latent ambiguity in the clause of the will in question?

The language is: "I give and bequeath to my nephew, Peter Nevius, one acre of land joining the road leading from Metuchen to Bonhamtown on the west; and my house lot on the east." This seems to be very explicit and appropriate language to devise one acre of land, describing it as bounded by the road on the west, and by the house lot on the east. It is as clear as if the expression had been, joining the road on the west, and joining the house lot on the east. Should any possible doubt arise from that part, it is removed by what follows, namely: "but if the said Peter Nevius should die before the age of twenty-one years, I give said lot to his brother, John Nevius." This is a devise over of one lot, and not of two, and clearly manifests the intention of the testator. And, although at the time of making the will, or before or afterwards, the fences between the lots were removed, and all the land occupied as one tract, yet the testator had in his mind two distinct lots, and as they were when he purchased the one acre lot, and he uses the terms "one acre of land" adjoining the road "and my house lot."

I can see no intention of devising two lots, nor any ambiguity, latent or patent, hidden or open.

I think the testimony was properly overruled, and that no error is shown.

The judgment must therefore be affirmed with costs.

OGDEN, J. The plaintiff claimed the premises in question, being the house lot of David R. Martin, deceased, by and through the will of said Martin.

In support of his title, he gave the will and probate thereof in evidence before the jury. After ordering his debts to be paid, the testator gave to his wife, in lieu of her dower, some personal estate, and the use, during her natural life, of all his real estate, consisting of a house and fourteen and a half acres, where he then dwelt, with all the appurtenances; one wood lot, containing three and a half acres, giving its bounda-

Nevius v. Martin.

ries, and two lots of salt meadow, stating that the wood lot and salt meadow were devised to him by his father. After giving directions about the sale of a nine acre lot, and the disposal of the proceeds of the sale, he made the following devise, it being the clause in the will through which the plaintiff claims title:

Item. "After the death of my said wife, I give and bequeath to my nephew, Peter Nevius, one acre of land, joining the road leading from Metuchen to Bonhamtown on the west, and my house lot on the east; but if said Peter Nevius should die before the age of twenty-one, I give said lot to his brother, John Nevius." He then directed his executors to sell all his real estate after the death of his wife.

The plaintiff contended that the devise to him embraced the house lot of fourteen and a half acres, insisting that the description of the one acre was full, by placing it on the road leading from Metuchen to Bonhamtown, and that the remainder of the sentence was an additional devise to him of the house lot.

In support of his claim, his counsel proposed to prove by Abraham D. Titsworth, the scrivener, who drew the will at testator's request, that by the instructions given to him by the testator, at the time of writing the will, he was directed to devise the lot in question, containing about fourteen acres, to the plaintiff in fee, and that, by the language in that respect used in said will, he believed that such intent was expressed.

The counsel for the defendants objected to the admissibility of the oral testimony, and the court overruled the offer, and rejected the testimony as illegal in support of the issue. An exception was prayed, by the counsel of the plaintiff, to the decision of the court, which was allowed and sealed.

Was the testimony legally admissible? If so, on what principle?

The case states that the testator, at the date of the will, owned a lot of about one acre, which he purchased of Jonathan Acken and wife, by deed, June 17th, 1840; that it ad-

Nevius v. Martin.

joins the road leading from Metuchen to Bonhamtown on the west, and testator's house lot on the east; that when conveyed to the testator, it was separated by a fence from the house lot; but after the purchase, the fence was suffered to go down, and at or some time before the testator's death there was no fence between the two. The testator lived on the *house lot*, which lay east of the one acre lot, and contained over fourteen acres.

The will is dated July 15th, 1842.

This testimony was offered to remove a latent ambiguity in the will.

Is there such an ambiguity in the words of this will, rendered so by extrinsic and collateral matter out of the instrument itself?

Does any ambiguity lie hidden in the persons or subjects whereof the will speaks? Does not the question raised by the plaintiff grow out of the construction of the language employed by the testator?

If the word *and* is construed to apply to the description of the one acre lot the plaintiff's case falls. If it be construed as describing the house lot on the east as a subject of devise to Peter, then the plaintiff's title is made out. How could a conversation between the testator and the scrivener aid in construing the sentence? There is no uncertain person to take, and no uncertain thing described, and no identification of person or subject of devise required. The one acre and the house lot are certain subjects of devise, and Peter was a certain man, and they cannot be rendered more certain by proof of extraneous facts and surrounding circumstances.

The case does not fall within the rule, which allows the introduction of oral testimony to explain the written language. If there be no latent ambiguity, the construction of a will must be drawn from the words; and parol evidence cannot be admitted to supply, contradict, enlarge, or vary the words, or to explain the intention of the testator. 3 *Halt.* 72, *Evidence*.

Nevius v. Martin.

If any ambiguity exists here, it is patent on the face of the will, and was a question of judicial construction for the court.

Again. Should the testimony have been admitted to correct alleged mistakes of the scrivener?

The case cited in 7 *Johnson*, of *Johnson v. Clark*, does not support the proposition. "The power of devising by last will and testament would be deeply impaired by accepting any other evidence of the testator's intention, than what is to be gathered from the will itself," if it can have an effective operation without the aid of the testimony.

A different rule would lead to the making of wills in court, and not to the legal construction of them.

The present case furnishes a strong illustration of the wisdom and safety of the rule.

In 1842, the testator made his will, in language capable of receiving an effective operation in consistency with the surrounding facts, and eighteen years afterwards, the scrivener is called to testify that he was instructed to draw a different will, and supposed that the language which he employed created a devise different from that which a proper construction of the clause will support.

The admission of the testimony would have tended to make a new will for the testator.

I am clearly of opinion that there was no error in rejecting the testimony.

The court gave a proper construction to the clause in the will, by ruling that the introduction into it of the house lot, was only descriptive of one of the boundaries of the one acre lot, and that the house lot did not pass to the plaintiff by the devise therein made to him, and properly ordered the plaintiff to be called.

The judgment below must be affirmed with costs.

VREDENBURGH, J., concurred.

Judgment affirmed.

State v. Delaware, Lackawanna, and Western R. R. Co.

THE STATE OF NEW JERSEY v. THE DELAWARE, LACKAWANNA, AND WESTERN RAILROAD COMPANY.

THE STATE OF NEW JERSEY v. THE NEW YORK AND ERIE RAILWAY COMPANY.

1. A law laying a special tax on the business of foreign corporations, regularly doing business in this state, transporting passengers and merchandise across the state, from and to foreign states, such tax being graduated by the number of the passengers and the weight of the goods carried, is not an infringement of that clause of the constitution of the United States which gives to congress the power to regulate commerce among the several states.
2. Such commerce is not of such a national character, that a state may not regulate it in the manner complained of, without violating the constitution of the United States.
3. Such tax is merely a tax upon the company, in proportion to the number of passengers and weight of merchandise transported by them within this state, and not a regulation of commerce among the states.
4. A foreign corporation, upon which has been conferred by the legislature of this state the power to purchase and hold lands in this state, does not, by reason of such legislative action, lose its foreign, and acquire a domestic character. A corporation can be properly said to exist only in the state which created it.

These suits were brought by the state to recover the amount of the transit duty claimed to be due from the defendants, respectively, for the passengers, goods, wares, and merchandise transported by them, or for them, on certain railroads in this state, a distance exceeding ten miles.

The claims are made by the state, under the 10th section of the act of March 28th, 1862, entitled "a further supplement to an act entitled, an act concerning taxes," approved April 14th, 1846.

This section provides, that all corporations regularly doing business in this state, and not being corporations of this state, shall be assessed and taxed for and in respect of the business so by them done and transacted in this state, in manner following, that is to say: "every such company so doing business shall pay a transit duty of three cents on every passenger,

State v. Delaware, Lackawanna, and Western R. R. Co.

and two cents on every ton of goods, wares, and merchandise, or other articles, carried or transported by or for such company, or on any railroad or canal in this state, for any distance exceeding ten miles, except passengers and freight transported exclusively within this state, &c.; and such transit duty for railroad or canal transportation shall be paid to the treasurer of this state within the month of January, in each year, for the transportation of the previous year; and it shall be the duty of the president or treasurer of every such company to furnish to the treasurer of the state, by or before the third Tuesday of January, annually, under oath or affirmation, a full and true account of the number of passengers and of the number of the tons of goods, wares, and merchandise, and other articles, so carried or transported as aforesaid."

An issue was made up between the state and the defendants, respectively, and were cases agreed on to be submitted to the Supreme Court, for their decision without a jury, according to the provisions of the act of March 13th, 1862, entitled "an act relative to taxes due from incorporated companies in this state," and a supplement thereto, passed March 11th, 1863.

It appeared that the Delaware, Lackawanna, and Western Railroad Company was incorporated by the state of Pennsylvania, and the New York and Erie Railway Company was incorporated by the state of New York, and that both companies carried and transported through the state of New Jersey, for a distance of more than ten miles, on railroads in this state, and operated by the said defendants, under lease or agreement made or entered into by said defendants with the companies owning said railroads, and so, by transshipment to New York and other places, passengers and freight, brought over their roads in New York and Pennsylvania and other connecting roads from the west.

The defendants claimed—

First. That they were not within the provisions of the act of 1862; that owning property and using roads in

State v. Delaware, Lackawanna and Western R. R. Co.

this state by its permission, they could not be considered foreign corporations within the meaning of the act; and

Secondly. That if within its provisions, that the act itself is an infringement of that part of the constitution of the United States which confers upon congress the power to regulate commerce with foreign nations and among the several states, &c.; that the power of congress is exclusive, and cannot be controlled or interfered with by the states.

All the facts contained in the cases agreed on, having any practical bearing on the questions submitted and decided, will be found referred to by the court in their opinion.

Both causes, involving the same general principles, were argued together at the November term, 1863.

For the state, *F. T. Frelinghuysen*, attorney general.

For the several defendants, *Jehiel G. Shipman*, *David A. Depue*, and *Isaac W. Scudder*.

At this term, February, 1864, the following opinions were delivered.

HAINES, J. This cause comes to us on a special case, made pursuant to the act of March 13th, 1862, relative to taxes due from incorporated companies in this state, and its supplement, of March 11th, 1863, making it applicable to incorporated companies, whether in this state or not. The object of the suit is to test the validity of a claim for tax, alleged to be due to the state from the defendants, under the 10th section of the act of 28th March, 1862, which is a supplement to the act concerning taxes.

This 10th section provides, "that all corporations regularly doing business in this state, and not being corporations of this state, shall be assessed and taxed for and in respect of the business so by them done and transacted in this state, in manner following, that is to say : every such company shall

State v. Delaware, Lackawanna and Western R. R. Co.

pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise, or other articles, carried or transported by or for such company on any railroad, or carried in this state for any distance exceeding ten miles, except passengers and freight transported exclusively within this state."

The case shows the number of passengers and tons of freight so transported by the defendants; whether they are liable to be assessed and taxed for the business so done by them, is the question to be decided.

It is insisted that this company is not liable to the tax claimed—first, because it is not a company regularly doing business in this state. But the case shows that they are the lessees of the Warren railroad, for the transportation of coal and other merchandise, and of passengers, a distance exceeding ten miles within this state; and if this be so, they are a corporation regularly doing business in this state.

It is further objected that there is no liability on the defendants, because they are not within the terms of the description, "not being corporations of this state;" that the legislature, by authorizing the defendants to purchase and hold lands here, and to lease the Warren railroad, created them a corporation of this state; that the company thereby lost its foreign, and acquired a domestic character. By the state of the case, it appears that the Delaware, Lackawanna, and Western Railroad Company was created by an act of the legislature of Pennsylvania. And the act of New Jersey, conferring upon it power to purchase and hold lands in this state, calls it a corporation existing under the laws of Pennsylvania. The state which creates a corporation gives it a local habitation as well as a name, and there only it can properly be said to exist. Its arms and operations may extend beyond, but the body, the source of its vitality, is limited to the place of its nativity. Powers and privileges may be conferred by another state, but that does not divest the corporation of its foreign character. The rights of citizenship

State v. Delaware, Lackawanna, and Western R. R. Co.

conferred upon an alien make him a naturalized, but not quite a native born citizen.

In the case of *The Phillipsburg Bank v. The Lackawanna Railroad Company*, 3 Dutcher 206, on a motion to quash a writ of attachment issued against the latter, it was urged that the act authorizing the defendants to hold land and to transact business within this state did, of necessity, constitute them a domestic corporation, as much so as if chartered by the laws of this state. But this court held that the legislature has clearly distinguished between the creation and the recognition of a corporation. That the one refers clearly to a domestic corporation, having its place within this state and subject in all respects to the control of its laws, the other to a foreign corporation, having its place within another state, deriving its being from and subject to the control of the laws of such state, but recognized by the laws of this state, as having power to exercise its franchises or transact its business here.

These objections cannot prevail, and it must be held that the defendants are one of the corporations contemplated by the act under which the tax is claimed.

A more serious question is raised upon the constitutionality of the act. It is insisted, by the counsel of the defendants, that it is in violation of the 8th section of the first article of the constitution of the United States, which confers upon the congress of the United States the power to regulate commerce with foreign nations and among the several states.

It is claimed that this power conferred on congress, has been adjudged to be exclusive, and that any attempt on the part of a state, to regulate commerce among the states by interfering with its freedom, or making hostile or burthensome discriminations, is an infringement of that power and void; and that, in the strong and terse language of Judge Grier, in the *Passenger cases*, 7 How. 464, "congress has regulated commerce and intercourse between the states by willing that it shall be free." If this position is conceded, it must be with considerable modification.

State v. Delaware, Lackawanna, and Western R. R. Co.

By the term commerce, is meant not traffic only, but every species of commercial intercourse, every communication by land or by water, foreign and domestic, external and internal. Hence the power to regulate it must, in the language of Judge Curtis, in *Cooley v. The Board of Wardens of Philadelphia*,* “embrace a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every port, and some as imperatively demanding that diversity which alone can meet the local necessities of navigation,” and it may be added, the local necessities of domestic intercourse. “Where the subjects of such intercourse,” continues Judge Curtis, “are in their nature national, and require a uniform system of regulation, they may justly be said to require exclusive legislation by congress.”

When commerce is of this national character, there is no constitutional or legal power in a state to interrupt, impede, or regulate it. But where it has not such national character, the states do many things to regulate it, and some that more or less affect commercial intercourse without any violation of the constitution.

Laws, for example, for the regulation of pilots and pilotage, are not questioned as to their constitutionality. The regulation of the fares and tolls on turnpikes, railroads, and ferries, even directly between two states, is wholly within the jurisdiction of the states, and such power has been continually exercised, and in the case of *The Chosen Freholders of Hudson County v. The State*, 4 Zab. 730, it was held, by the Court of Errors, that the exercise of such power was in no wise repugnant to the provision of the constitution.

It is further insisted, that the act in question practically lays a tax upon imports and exports, and so violates the 10th section of the first article of the constitution of the United States, which provides that no state shall, without the consent of congress, lay any imposts or duties on imports or exports. If that be true, the act is clearly unconstitutional,

* 12 How. 299.

State v. Delaware, Lackawanna, and Western R. R. Co.

no consent of congress for that purpose having ever been given.

This leads to the important inquiry—does the act in question attempt to interrupt or to regulate commerce, or to impose duties or imposts on exports or imports?

It does not exclude from the state any class of persons or of property, or of vessels or other vehicles of transportation, as did the act of New York, which granted to certain individuals the exclusive use of its waters for navigation of vessels propelled by fire or steam, and which was declared to be unconstitutional in *Gibbons v. Ogden*, 9 *Wheat.* 1.

Nor does it prohibit or restrain the sale, and thereby tend to impede the importation of any article, by requiring the vendor to obtain a license to sell, as in *Brown v. The State of Maryland*, 12 *Wheat.* 419, and in the *License cases*, 5 *How.* 504.

It imposes no impost, tax, tribute, or duty, directly or indirectly, on passengers or goods, and is not within the principle of the *Passenger cases*, 7 *How.* 283.

Nor does it impede the export of any article, by requiring stamps upon bills of lading or otherwise, and is not within the ruling of *Almy v. The State of California*, 24 *How.* 169. It makes no discrimination between the property of citizens of this state or of other states; nor are the passengers or the owners of goods, or the goods themselves, in any wise made subject to the tax, or retarded by it.

The tax is laid upon the company without respect to the ownership of the goods, or to the residence of the passengers. It is not enforced by levy and distress; but is required to be paid by the company into the treasury of the state, and in default of payment, to be recovered by an action at law.

It is a tax upon the company "for and in respect of the business by them done and transacted within this state," computed by the tons of merchandise and numbers of passengers transported. There is no *ad valorem* clause; all goods are estimated by the ton, whether they consist of iron or gold, coals or diamonds, tow cloth or laces, vinegar or

State v. Delaware, Lackawanna, and Western R. R. Co.

wine. Had the act provided that the company should pay a certain sum for every car or every locomotive employed, the right to do so would hardly have been questioned.

The right to tax carriages habitually used in the state will not be denied. Had the act required the payment of a percentage on the earnings of the company from its operations here, it would have been within the principle on which incomes are assessed.

The tax in question is neither more nor less than a tax on the income of the company, from its business in this state, the easiest mode of ascertaining which, is by the company's annual statement of the number of passengers and of the tons of merchandise transported.

It imposes, it is true, this tax on a foreign corporation, and because it is foreign. Were it domestic, it would be taxed on its capital or its cost, and be subjected to a much greater burthen. But being foreign, it is relieved from the heavier duty. This corporation enjoys the franchise of the state; its property here and all its rights are under the protection of the laws of this state, and there is no reason why, in common with the corporations and citizens of the state, it should not bear its fair proportion of the expenses and burthens of the state government.

It may be that the rate of taxation is too high, and so operates unequally; but that is a matter of legislative action, and not of judicial construction. The remedy is to be found in the legislature, and not in the courts.

It is contended further, that the act in question is in violation of that clause of the constitution of New Jersey which forbids the passage of any law impairing the obligation of contracts; that the charter of the Warren Railroad Company imposes a certain tax on its capital, and exempts the company from any further or other tax; and that the tax imposed by this act is virtually a further tax on the Warren Railroad Company.

If it be admitted, for the sake of the argument, that the Warren Railroad Company, by an irrevocable contract in

State v. Delaware, Lackawanna and Western R. R. Co.

their charter, are exempt from further taxation, and therefore within the exception of the 8th section of the act in question, it is difficult to perceive how this tax is laid upon them. It is not charged upon them, nor upon their property, nor does it diminish the value of their receipts for rent or otherwise. The defendants, by the terms of the lease of the road to them, are required "to pay and discharge all taxes, assessments, and impositions which shall or may be legally taxed, assessed, or imposed upon the premises and property" leased to them. An additional tax cannot affect the Warren Railroad Company.

The defendants, as lessees, can on that account claim no exemption. The tax is not on the Warren Railroad Company, nor upon their road, stock, property, or franchises. It is simply upon the defendants in respect of their profits and earnings by the transportation, in this state, of passengers and property. Were they not operating the road, and regularly doing business upon it, they would not be subject to the tax; but as they are lessees operating the road and regularly doing business upon it, they may with propriety be asked to pay something on the profits of the business, and to contribute something to the support of the government whose privileges they enjoy, and under whose protection and laws they prosecute their business.

The principle of the section of the act in question is not novel, nor its application without precedent.

By the act of February 4th, 1830, the Camden and Amboy Railroad and Transportation Company were required to pay to the state at the rate of ten cents for each passenger, and fifteen cents for each ton of merchandise, transported on their road. By subsequent acts, the payment for passengers was made applicable to those transported over the whole line of the road—to through passengers.

By the act of March 7th, 1832, the New Jersey Railroad and Transportation Company were required to pay a tax on their capital; and when thereupon any railroad should intersect or be attached to their road, so as to make a continued

State v. Delaware, Lackawanna and Western R. R. Co.

railroad, carrying passengers across the state of New Jersey between the states of New York and Pennsylvania, then they were required to pay into the treasury of the state at the rate of eight cents for every passenger, and twelve cents for every ton of merchandise transported thereon.

Nor are these precedents confined to this state.

The legislature of Maryland, by an act of 1832, authorized the Baltimore and Ohio Railroad Company to construct a branch road from Baltimore to the city of Washington, fixed the fare of each passenger at two dollars and fifty cents; and then required the company to pay, semi-annually to the treasurer of the Western Shore of Maryland, one-fifth of the whole amount received for the transportation of passengers over their said branch road.

The legislature of Pennsylvania, by an act of 21st April, 1846, granted the assent of the state to the Baltimore and Ohio Railroad Company, to locate and construct a continuation of their railroad from the town of Cumberland, in the state of Maryland, to the city of Pittsburgh; and required the company to pay, every six months, into the treasury of the state, as a tax or duty on all tonnage, except the ordinary baggage of passengers transported on that continuation of their road, such tax as the legislature might impose, not exceeding three mills per ton per mile; and in addition thereto, a tax or duty on all passengers that may have passed, during each preceding six months, a distance of one hundred miles or more of said road between these points, at such rate as the legislature might direct, not exceeding fifty cents for each passenger, until the construction of a railroad connecting the Baltimore and Ohio railroad with the Cumberland Valley railroad, by the Cumberland Valley; after that, the tax or duty not to exceed twenty-five cents for each passenger.

By an act 26th March, 1846, the legislature of Pennsylvania granted authority to the New York and Erie Railroad Company, to extend their line of railroad from a point in the village of Port Jervis, in the state of New York, across the Delaware river, into the county of Pike, in the state of

State v. Delaware, Lackawanna, and Western R. R. Co.

Pennsylvania, and up the valley near the shore of the river, a distance not exceeding thirty miles; and the stock of the company, equal in amount to the cost of such construction in Pennsylvania, was made subject to taxation in the same manner and to the same amount as other similar property was or might be made subject. And the company was further required, after the completion and operation of their road to Dunkirk, or its connection with any railroad to Lake Erie, to pay into the treasury of Pennsylvania the annual sum of ten thousand dollars, on the penalty of forfeiture of the rights and privileges granted by the act.

In the state of New York, too, we find an act, as early as April 15th, 1817, respecting navigable communication between the great western and northern lakes and the Atlantic ocean; and for the purpose of raising a canal fund, various taxes were imposed, among others, "a tax of one dollar upon each steamboat passenger, for each and every trip or voyage such passenger may be conveyed on the Hudson river on board of any steamboat over one hundred miles; and half that sum for any distance less than one hundred miles and more than thirty miles."

These acts, except the last named, have long been in force, and public attention almost constantly directed to them. Great complaints, indeed, have been made by parties interested, and perhaps by others, against the mode of taxation. The acts of this state, particularly, have been the theme of much criticism, and afforded the subject of many a piquant joke and bitter sarcasm. All the acts referred to have been the subject of earnest discussion, as to their justice and expediency; but I am not aware of any question having been raised respecting the constitutionality of any of them.

It is said that these taxes were a part of the terms of incorporation, and a matter of contract entered into by the several companies, and the question of constitutionality thus avoided. But no contract respecting a regulation of commerce can make it constitutional. Consent can give neither jurisdiction nor constitutionality. Each act must stand upon its own merits, and fall for the want of them.

State v. Delaware, Lackawanna, and Western R. R. Co.

If legislative construction of a measure is of any value, we surely have it in the acts referred to. They are all based upon the principle, that a state may tax individuals or companies, who exercise privileges within the state, and are protected by its laws; and they emphatically declare that, by so doing no article of the constitution of the United States is violated. I am satisfied that the act in question in this case is not in violation of any clause of the constitution of the United States or of this state.

Whether it is expedient to impose the tax contemplated by the 10th section of this act, and by so doing to follow the precedents set by the states of Maryland, Pennsylvania, and New York, is a question to be determined by the maker, and not by the expounder of the law.

In my opinion, judgment should be rendered for the state on the case made.

VREDENBURGH, J., concurred.

VAN DYKE, J. By certain acts of the legislature of this state, the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company were severally incorporated, and authorized to construct railroads between Jersey City and the northerly line of this state, so that the whole together would form a continuous road between those points. Both these roads have been completed, and embrace a line of road through the state of a little more than thirty miles. These roads have, under the assent and sanction of our legislature, been leased to the Erie Railway Company, a corporation chartered by and belonging to the state of New York, and whose road extends from Piermont, on the Hudson river, to Dunkirk, on the southerly shore of Lake Erie. The company, by virtue of the leases aforesaid, and of the Union railroad, incorporated by the state of New York, are now using the roads so leased, in connection with their own, in transporting passengers, goods, wares, and

State v. Delaware, Lackawanna, and Western R. R. Co.

merchandise, between Dunkirk and the city of New York, into and through this state.

On the 28th day of March, 1862, our legislature passed an act concerning taxes, the 10th section of which is as follows, *viz.*:

“That all corporations regularly doing business in this state, and not being corporations of this state, shall be assessed and taxed for and in respect of the business so by them done and transacted in this state, in manner following, that is to say: every such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise, or other articles carried or transported by or for such company, on any railroad or canal of this state, for any distance exceeding ten miles, except passengers and freight transported exclusively within this state.”

It appears that between the passage of this act and the 31st day of December of the same year, the tax or transit duty on the passengers and merchandise carried by the Erie Railway Company into or through this state, over the leased roads aforesaid, amounts to the sum of \$18,824.25. To recover this sum, the proceedings in this case have been instituted.

Several reasons have been offered to show that this tax, or these transit duties, should not, and cannot be collected from the Erie Railway Company. I shall notice but one of them.

It is insisted that this act, and the enforcement of it, is a violation of the constitution of the United States; for that it is an interference with, and an attempt to regulate commerce among the several states, and also that it imposes a tax upon imports into, and exports from the state.

Among the many wise provisions of the constitution, is that which confides to the national congress, which usually includes the executive, the power to regulate commerce with foreign nations and among the several states. It is not difficult to see how much the national government might be embarrassed, and the states themselves imperiled, if each one

State v. Delaware, Lackawanna, and Western R. R. Co.

were permitted to make and establish its own laws and rules of trade and commerce with all the world, according to its own views of expediency. Nor is it difficult to perceive the strifes and feuds, and bitterness and possible collisions, in which the states might be involved with each other, if spiteful, vindictive, and retaliatory laws were permitted to be passed and executed with regard to each other, whenever passion or prejudice or self-aggrandizement should present a sufficient motive. The framers of the constitution, therefore, to protect the states from these extreme perils, wisely interposed between them the more discreet and deliberate power of congress. It is scarcely supposable, that a majority of that body would ever consent to give to any one state, or to its citizens exclusively, any material advantage over any of the rest.

This right to regulate commerce among the states, thus confided to congress, must also, of necessity, be exclusive, as much so as the right to regulate it with foreign nations; for the powers which the states granted to congress, they must be considered as having surrendered to the general government, and no longer to be exercised by them. No reservation on the part of the states seems to have accompanied this grant to congress; and if the states can exercise concurrent control with the congress in the matter before us, or until such time as congress shall interfere to prevent it, it is difficult to see why they may not also do so in all other similar cases; why they may not establish general laws of naturalization and laws of bankruptcy; why they may not coin and regulate the value of money, and fix the standard of weights and measures, establish post-offices and post roads, grant letters patent, declare war, and grant letters of marque and reprisal, and the like. These are powers granted to congress, and but few of them are in terms prohibited to the states; and yet they have always been considered as belonging exclusively to congress, with which the states had no right to interfere or attempt to regulate, whether congress had at all acted in the matter or not. If the states have

State v. Delaware, Lackawanna, and Western R. R. Co.

concurrent jurisdiction with congress to pass laws on the subject of commerce, then the congress has no power to annul such laws ; and if congress has power to annul them, it must be because the states have no right to pass them ; and if the states have no right to pass them, the courts of the states should not sustain them. But this question seems to be very well settled by authorities which we are not at liberty to resist, and I do not understand it to be denied.

Is, then, this act of our legislature, imposing the tax on the passengers and property carried by the Erie Railway Company into and through our state, or over more than ten miles thereof, as before mentioned, and the effort to enforce it, an attempt to regulate commerce among the several states? It is conceded that the passengers and merchandise carried into or through our state, the one way and the other, by this New York railway company, are from most, if not all the states of the Union. Now, commerce among the several states unquestionably consists in the carrying of persons or commodities from one state into another, whether it be an adjoining one or not, for the purpose of business or pleasure, or for the sale or exchange of such commodities, or for the disposition of them in some other way. This is commerce, and it is commerce among the states, and it seems to me to be precisely what the Erie Railway Company, through its agents, its railroads, its conveyances, and its motive power, are doing for all persons in the country who see fit to employ it. It is thus aiding, by its great power, the people of the different states, in carrying on their commerce and intercourse with each other, as the constitution presumes they will find it necessary or expedient to do ; and any attempt on the part of any one of the states, to obstruct or impede or prevent such commerce, unless it be in some necessary police regulation, or to prescribe the terms and conditions on which such commerce shall enter its limits, cross its territory, or leave its borders, is necessarily an attempt to regulate, to that extent at least, commerce among the states ; a thing which it cannot lawfully do. This act of the legislature does undertake to prescribe and enforce the terms and conditions

State v. Delaware, Lackawanna, and Western R. R. Co.

on which this foreign railway company may carry persons and commodities within, across, and from our territories, not by making contracts with it for that purpose, but by the imposition of a tax, called a transit duty, upon every passenger and every ton of merchandise which it brings into or takes out of the state, provided the distance carried within the state exceeds ten miles.

It may be admitted, I think, for the purposes of this case at least, that the legislature may regulate the commerce which is carried on exclusively within the limits of the state; for this is not attempting to regulate or interfere with commerce among the *several* states. But the act in question does the exact contrary of this. It is careful not to tax the passengers or freight carried exclusively within the state, although they be carried from one side of it to the other, but it affects *only* the passengers and freight that are brought into the state, and those which are carried out of it into other states, and every farthing of the tax or transit duty claimed in this suit, has arisen on passengers and merchandise that have been brought into or carried out of the state; so that the act operates exclusively upon the commerce among the different states, which is the thing prohibited by the constitution of the United States. It is easy to see, if this law is sustained, how the entire commerce carried on in and through the state by this railway company, so far as it relates to the persons and property brought into the state and those that are carried out, may be wholly destroyed. For if the courts sustain the law, the company has no alternative but to pay the tax or to cease doing the business. For as there is no limit to the extent to which a tax may be imposed, if the right to assess it at all be conceded, it may be increased and extended to the destruction of the object on which it is made to operate; and if the state can lawfully impose a tax of three cents on a passenger, and two cents on a ton of merchandise, why may it not also impose a tax of ten cents, or twenty cents, or more on each, which would, of necessity, ruin and break up the entire commerce thus carried on; and

State v. Delaware, Lackawanna and Western R. R. Co.

if it can thus tax it at will, why may it not prohibit it altogether? Can it be that the state has the power to do this? I cannot think so.

It is doubtless true that the state may refuse to permit railroads and canals to be constructed for the purpose of facilitating this kind of commerce; but this relates only to the particular modes of conveyance, and does not affect the right of the people to carry on the commerce itself by other modes of conveyance. But if the state *had* the right to prohibit these particular modes of conveyance, it is now too late to exercise that right. It has already granted the privilege, and the roads have been made and are in use. It has already consented to the leasing of these roads to the Erie Railway Company, and the leases have been executed and delivered. These New Jersey roads have already paid all the tax imposed upon them by their charters; and now, after having assented to all these arrangements, with a view to this very commerce among the states, the state undertakes to tax that commerce by the assessments under consideration.

It is insisted, however, that this is not a taxing of commerce among the several states, but a taxing of the business of the company. It is true that this is a taxing of the business of the company; but then the business of the company is the carrying on of commerce among the states, quite as much so as if the same thing was done by vessels navigating the waters of the country; so that whether we call it the one thing or the other, it brings us to the same conclusion. It is a tax and restraint upon the commerce among the states. The calling of things by different names cannot change the great thing itself.

It is doubtless true that the business of this railway company carried on in the state, as well as all its property permanently within its limits, may be taxed. But then the business thus taxed must be, I think, that which is confined exclusively to the state, and not that which is necessarily connected with business outside the state, such as the carry-

State v. Delaware, Lackawanna and Western R. R. Co.

ing of merchandise, &c., from one to the other for sale or exchange. This is commerce *among* the states, and, as we have before seen, our act expressly excludes from its operation business of this company which relates exclusively to this state, and confines it exclusively to those passengers and that merchandise which enter from or go into other states: and this is what gives to the act its objectionable and unconstitutional feature.

There are some things which states may do, although they may, to some extent, affect commerce. They may pass laws for their own preservation. They may prevent the introduction of dangerous diseases, of crimes and criminals, and the various species of demoralization and pollution. Such acts are held to be not acts for the regulation of commerce, within the meaning of the constitution; but they are laws for the preservation and protection of the people, in their internal affairs, from the evils which might otherwise be cast upon them, and are therefore termed internal police laws, and are such rights and powers as the states are held never to have surrendered.

So, too, the states may impose such burthens and restraints upon the traffic, on the part of its citizens, in articles that were once imports, after they have lost that character, and become broken up and mingled with the other private property in the state, as would discourage the importation of such articles, by which the nation would lose some revenue. But this is held to relate only to their own internal affairs, after they have become such, and not to commerce with foreign nations nor among the several states.

If the question before us were a new one, I should feel constrained, by the very clear and express language of the constitution itself, as well as by the urgent necessity which caused the provision to be inserted, to hold our act to be repugnant to that great instrument. It is well known that the general government, under the old confederacy, had no power over commerce, but each state acted in relation to it in a way most satisfactory to itself; and the consequences of

State v. Delaware, Lackawanna, and Western R. R. Co.

such action became so alarming to the country, that they became one of the most leading motives for the assembling of a convention to frame a new constitution. The new constitution, it was supposed, remedied the evils in the old articles of confederation. Such has been the view which the Supreme Court of the United States has constantly taken of the subject; and it has so repeatedly, as I understand it, decided the point under consideration, in the varied forms in which it has been there presented, that if I doubted the correctness of their decisions, I should still feel myself bound by them.

There are a number of decisions in the state courts, in which those tribunals have held differently from the Supreme Court of the United States, but I do not stop to cite them here; not because they are not entitled to great respect in themselves, but because I do not consider them as authority in such cases. In point of fact, all the cases that have ever reached the Supreme Court, on appeal from the state tribunals, have been cases where those courts have sustained the state laws; but the higher court reversed or affirmed them as in its judgment it thought right. It has the power to reverse them. It is the court of last resort in all such cases, and to its decisions we are bound to conform and submit, as much so as our local courts are bound to conform to the decisions of our own supreme tribunal.

The Supreme Court of the United States, having frequently had this question in some form before it, has uniformly, as I understand it, decided it in the same way. In 1819, or thereabouts, the state of Maryland passed an act to tax the branch of the United States Bank located in that state. The bank was chartered by an act of congress, in carrying out one of its constitutional functions. The court held that the act of congress, under the provision of the constitution on the subject, was supreme; and that where that power was supreme, any act of a state legislature that attempted to interfere with that power, or to burthen or restrain or impede it, was contrary to the constitution, and

State v. Delaware, Lackawanna, and Western R. R. Co.

therefore void. The decision of the state court sustaining that act was reversed. *McCulloch v. The State of Maryland*, 4 *Wheat.* 316.

A case, which attracted much more public attention, and was most elaborately argued and carefully considered, was the case of *Gibbons v. Ogden*, decided in 1819. The legislature of the state of New York had granted to certain persons the exclusive right, for a period of years, to navigate vessels propelled by fire, or steam, within or upon all the waters of that state, including its rivers, lakes, and bays. A portion of these exclusive rights and privileges had been transferred to Ogden, and were owned by him. Gibbons was the owner of two vessels, propelled by fire and steam, which were duly licensed, enrolled, &c., for the coasting trade. With these vessels he attempted to navigate the waters of New York, and to carry in them passengers, &c., from Elizabethtown, in this state, to places in the state of New York, and also from places in that state to Elizabethtown, in this state. From doing this he was restrained by an injunction from the Court of Chancery of the state of New York, pursuant to the provisions of the statute of that state. This proceeding was sustained by its highest legal tribunal, from which an appeal was taken to the Supreme Court of the United States. That court held the act of New York to be one which attempted to regulate commerce, which included navigation among the several states, and was therefore void. The court held that the right to regulate commerce among the states, extends to every species of commerce and intercourse between the states, to men as well as to things; that it does not stop at the boundaries of states, but penetrates their interiors; that the powers vested in congress are complete in themselves, limited only by the constitution itself, and is not a concurrent power which a state may exercise. 9 *Wheat.* 1.

In 1827, the case of *Brown v. The State of Maryland* came before the court. The legislature of that state had enacted, "that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or pack-

State v. Delaware, Lackawanna and Western R. R. Co.

age, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and all persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license from the state authorities, for which they should pay \$50, subject to a penalty, &c. The defendant below was charged with having imported and sold one package of foreign dry goods, without having a license so to do. Judgment was given against the defendant in the state tribunals, and the case was removed into the Supreme Court. That court held this act of the legislature of Maryland to be void, not only because it was contrary to the provision of the constitution of the United States which prohibits the states from laying imposts or duties on imports or exports, but also because it was contrary and repugnant to the provision, which gives to the congress the power to regulate commerce with foreign nations and among the several states. The court strongly asserting, that the congressional privilege of importing foreign goods, &c., into a state, upon the payment of duties, or free from the payment of such duties, carried with it the right to sell such imports within a state, so long as they retained their character of imports, and remained in their original packages unbroken, and prior to their becoming mingled with the other private property of the citizens of the state, free from any impediments, in the shape of tax, license, or otherwise, imposed by state authority; reaffirming the doctrines announced in the case of *Gibbons v. Ogden*, and assuming that the same principles which applied to foreign importations applied equally to importations from sister states. 12 *Wheat.* 419.

In 1847, came up what were termed the license cases. The states of New Hampshire, Massachusetts, and Rhode Island had each passed a law prohibiting the sale of spirituous liquors within their respective limits, without a license for that purpose first obtained from the state authorities. The violators of these acts, being prosecuted, set up, as a defence, in two of the cases, that the liquors in question had

State v. Delaware, Lackawanna and Western R. R. Co.

been imported from abroad, and in the other case, that a barrel of American gin, the one in question, had been purchased in Boston, and carried coastwise thence to New Hampshire, and there sold in the same barrel. The cases were all argued and decided together. The court reaffirmed the doctrine announced in the case of *Brown v. The State of Maryland*; but the court held, several of the judges delivering separate opinions, that in all the cases the point of importation into the states had been passed without obstruction or impediment. No question was made by the state laws about bringing the liquors into the states: they were then there, and had become the property of the citizens of the states the same as their other property, and as such, the traffic in them was subject to the control of the state authorities, and might be taxed or restrained by them, the same as any other business or traffic.

The court also held, that these acts were clearly matters of internal police regulation; that the right of the state to guard and protect themselves against internal violence, disease, and demoralization was one which they had never surrendered, which were in their natures paramount to the right of congress to regulate commerce; and that such laws did not necessarily come in conflict with the exclusive power of congress to do so. These propositions are unquestionably correct, and if they were not so, they need not be controverted here. They do not reach the case before us. The act of our legislature is not one for the protection of our health, or peace, or morals, nor has it any of the features of a police regulation, but is purely one for the raising of revenue; nor is it one which relates to the persons and property in the state, after all questions as to the mode, and manner, and terms, in and upon which they came into the state, has been lawfully settled and disposed of; but it is confined exclusively to those transactions which relate to the terms and conditions on which persons and property are brought into the state, or are carried out of it. The railway company, call it what we may, are prohibited from either bringing them in or

State v. Delaware, Lackawanna, and Western R. R. Co.

carrying them out of the state, except on the condition of paying this tax for the privilege of doing so. If in these license cases the states had prohibited the *introduction* of these liquors into the states, or the carrying them out, except upon a purchased license so to do, they would have been analogous to the one under consideration. Judge McLean, in his opinion on this distinction, remarks, that "if this tax had been laid on the property as an import into the state, the law would have been repugnant to the constitution. It would have been a regulation of commerce among the states, which has been given exclusively to congress." 5 *How.* 504, *License Cases*.

In 1849, the passenger cases came before the Supreme Court. The state of New York had passed an act imposing a certain tax on every passenger that should arrive in the port of New York, either from foreign ports or in coasting vessels, which tax was to be collected from the masters of the vessels, who were in turn authorized to collect it from the passengers, and the moneys thus collected were to be termed "hospital moneys;" and after the requisite sums had been expended for that purpose, the surplus, if any, was to be paid to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York. In 1841, the ship *Henry Bliss* arrived in the port of New York, and landed two hundred and ninety steerage passengers. The master was sued for the tax imposed on these passengers by this act of New York, and the claim was resisted on the ground, that the act under which the effort to collect the tax was made was contrary to the constitution of the United States. The case was elaborately discussed, and although the court was not unanimous, it adhered to its former decisions, and held that the act of New York was one regulating, or attempting to regulate commerce, and was therefore void, although it was earnestly insisted that it was but a police regulation. 7 *How.* 283, *Passenger Cases*.

In 1851, the *Wheeling bridge* case came before the Supreme Court. This bridge was erected wholly within the limits of the state of Virginia, and specifically authorized by an act

State v. Dalaware, Lackawanna, and Western R. R. Co.

of the legislature of that state ; but in its construction, it was made so low that steamboats, with the tall chimneys commonly used on the western waters, could not pass under it. The state of Pennsylvania, finding her commerce with the west and southwest greatly obstructed and hindered thereby, applied to the equity side of the Supreme Court of the United States to compel its removal or modification, so that commerce would not be obstructed or impeded thereby ; taking the ground, that the Ohio river, though belonging to Virginia, was a highway of commerce, and that no act of the legislature of Virginia could authorize or justify the erection of a bridge over such a river that would interfere with the commerce of the river. The court entertained the application, declared the bridge to be an obstruction and a nuisance, and ordered it to be removed, or so elevated that it should cease to be an obstruction to commerce. The latter of which alternatives has been adopted. 13 *How.* 518.

In 1859, the legislature of the state of Alabama passed an act requiring the owners of steamboats navigating the waters of that state, before such boats should leave the port of Mobile, to file a statement in writing, in the office of the probate judge of Mobile county, setting forth—first, the name of the vessel ; second, the name of the owner or owners thereof ; third, his or their place or places of residence ; and fourth, the interest each has in the vessel ; and on omitting to do so, they should be subject to a fine, &c. This act was resisted, as being contrary to the power conferred on congress to regulate commerce among the several states and the act of congress regulating the coasting trade. The Supreme Court of the United States held this act of the legislature of Alabama to be unconstitutional and void for these reasons. *Sinnot and others v. Davenport and others*, 22 *How.* 227.

The cases that are supposed to take a different view of the subject are—first, that of *Wilson and others v. The Blackbird Creek Marsh Company*, which was decided as early as 1829. The legislature of Delaware, by an act which it passed, authorized this creek company to build a dam across

State v. Delaware, Lackawanna and Western R. R. Co.

one of the small creeks of that state, into which the tide flowed for some distance from the Delaware river through the marsh, and also to raise embankments on the shores. The defendants below were the owners of a sloop of less than one hundred tons burthen, regularly licensed and enrolled, claiming the right to navigate the creek as a highway of commerce, broke and injured the dam, for which injury the suit was brought; and the question was, whether this act of the legislature of Delaware, authorizing the dam, was repugnant to the constitution of the United States, on the ground of its interfering with commerce among the states. The defendants below were citizens of the state of Delaware. The court said the value of property on the banks of the creek, must be reclaimed by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are undoubtedly within those that are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The court adds, if congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, which was to control state legislation over those small navigable creeks, we should feel not much difficulty in saying, that a state law coming in conflict with such act would be void. But congress has passed no such act. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, *under all the circumstances of the case*, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

It must be conceded, I think, that the language of the

State v. Delaware, Lackawanna and Western R. R. Co.

court in this case, which is quite brief, is not very clear as to what general propositions it intended to annunciate, except to sustain the act of Delaware in that particular case; but it seems to assume that the state authorities in that section have a kind of concurrent jurisdiction with the general government, and that until congress sees fit to act in the matter, the states may do so, even to the damming up of a navigable river. If this be the idea, then it is certainly in conflict with all the cases decided on that subject, either before that time or since. 2 *Peters* 245.

The only other case, which it is supposed sustains the act of our legislature, is that of *The City of New York v. Milnc*, 11 *Peters* 102, decided in 1837. An act of the legislature of the state of New York provided, that the master of every ship or vessel, arriving in the port of New York from any country out of the United States, or from any other state of the United States, shall, within twenty-four hours after his arrival, make a report in writing, to the mayor of the city, of the name, place of birth, and last legal settlement, age, and occupation of every person brought as a passenger in the ship or vessel, or on board of her on her last voyage, &c., under a penalty of \$75 on each passenger. The city of New York sued the master of a vessel, who had landed such passengers, for not making the report required. The Supreme Court held that this act of the legislature of New York did not attempt in any way to regulate commerce, but was one which acted on the master and passengers after they were landed and had become inhabitants of that state; and was therefore a police regulation, which the state had a right to adopt, and was not in conflict with the constitution or laws of the United States. This decision is, I think, in perfect harmony with all that have been cited, or that have been rendered by that supreme tribunal, unless it may be, perhaps, the case of *Wilson and others v. The Blackbird Creek Company*; and that case, so far as it seems to hold that a state may go so far as to dam up a navigable river, and abolish thereby all navigation thereon and all commerce

State v. Delaware, Lackawanna, and Western R. R. Co.

thereon, provided congress has not legislated on the subject to the contrary, would not, I apprehend, at this day be sustained by any one.

The case of *Almy v. The State of California* came before the court as late as 1860. The legislature of that state passed an act to raise revenue for the support of the government thereof, and among other things, they enacted that all *bills of lading* for the transportation of gold or silver, in coin, bars, or dust, from any point or place in that state to any other point or place without the state, should have upon it a certain stamp, known there as a tax stamp, expressing in value the amount of such tax or duty.

To use such bill of lading without such stamp was, by the act, made a misdemeanor, and punished by fine. Almy, the defendant below, being the master of the ship *Rattler*, then lying at San Francisco, and bound for New York, received a quantity of gold dust, for which he gave a bill of lading without having any stamp attached to it. For this disobedience to the law of California, he was indicted, convicted, and fined \$100.

The application for the reversal of this decision was put upon the ground of the unconstitutionality of this law of California, both because it attempted to tax the commerce among the states, and also because it was a tax upon exports. The Chief Justice, in delivering the opinion of the court, put it on the latter ground only, not discussing the other one at all. He says: if this tax was laid on gold or silver exported, every one would see that it was repugnant to the constitution of the United States. But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing. He says the intention to tax the export of gold and silver in the form of a tax on the bill of lading is too plain to be mistaken. The act was pronounced unconstitutional of course.

In that case it will be seen that the Supreme Court brushed away, without ceremony, a most ingenious fiction, by which the constitutional prohibition was to be evaded by

State v. Delaware, Lackawanna, and Western R. R. Co.

the use of other terms and other means, and reached at once the real thing itself. If the court would do this when some question was supposed to exist as to the legality of the act, in consequence of this attempt at evasion, we may be assured that it would have annulled without hesitation an act that had taxed the export itself. The Chief Justice remarked, that that case could not be distinguished from that of *Brown v. The State of Maryland*, already referred to. That was an indirect tax upon an import. The California case was an indirect tax upon an export; both stand on the same footing, and the acts sustaining both were alike condemned as being unconstitutional. Now, in what do those cases differ from the one before us? What does our act in this respect do but to impose a tax on imports and exports both? Commodities brought into the state are imports, those taken out are exports. Is not this the very business in which the railway company is engaged, bringing imports into, and carrying exports out of the state? and what can the imposition of a tax or duties on both of these be but a tax upon imports and exports? Not, it is true, by taxing the commodities themselves directly, but by levying the tax upon the persons who carry them. This was the California case precisely. They did not attempt to tax the commodities themselves, but they attempted to tax, in an indirect form, the master of the ship who carried them. I do not propose further to discuss this feature of the case. It appears to me that no words that I can use can make it plainer.

I will simply add here, that the California case is a very conclusive one on the other point which I have considered. If that act authorized a tax upon an export, it unquestionably authorized an interference with commerce among the states; for a taxing of imports or exports is most certainly an attempt to regulate commerce: and if our act is an attempt to tax imports or exports, it is undoubtedly an act to regulate, to that extent, commerce among the states.

Nor am I able to see anything in conflict with the views I have expressed, in the fact that certain of the states, our

State v. Delaware, Lackawanna and Western R. R. Co.

own among the number, have, in the granting of chartered rights to canal and railroads companies, imposed upon them, as a part of the terms of the grant, the payment to the state of certain transit duties on the passengers and merchandise which they transport over their works; for, in the first place, these things are all confined to the limits of the states themselves. It is not contrary to the constitution of the United States to tax either the property or business of persons or corporations carried on exclusively within the state. The transit duties paid by the Camden and Amboy Railroad Company are not paid on passengers or merchandise on the ground that they come from other states, but it is exclusively on those who are carried within the state. Neither the chartered companies nor their rights extend beyond the limits of the state, nor is any difference made, nor is any notice taken, so far as the duties are concerned, whether the passengers and freight belong in the state or not. The charge is made on the assumption that all belong to the state, and nothing in addition is added in consequence of their coming from a foreign state.

The Camden and Amboy railroad does not extend from Philadelphia to New York, but from Camden to Amboy, wholly within the state; and the legislature had the right to impose on them the terms which they did, and the company had the right to accept them, and pay the duties, if they thought proper to do so. This being a transaction entirely within the state, it is in no way an attempt to regulate or to interfere with commerce among the states. The state, then, has the right to tax the business of anybody, carried on exclusively within the state, unless it may be the business of corporations or others who may have some special exemption from such taxation.

I do not know that any state has proceeded further by its legislation in this respect than our own previous to the act complained of; but if any of them have proceeded so far as to tax foreign persons or foreign merchandise for the privi-

State v. Delaware, Lackawanna and Western R. R. Co.

lege of coming into the state, I do not hesitate to pronounce such taxation unlawful.

It is not unconstitutional for the owner of a ship, who carries the commodities of another across the Atlantic ocean, to charge him for the transportation of such commodities from New York to Europe. This is not a tax upon exports, nor is it a regulation of commerce, nor is it repugnant to the constitution, for this state, or any of its corporations, to charge persons, whether they be foreigners or not, for the privilege of being carried over their roads in an easy, convenient, and expeditious manner, which the state or company has been at great expense in providing. The traveller is not bound to adopt that mode of travel. He may go on foot, or he may go with his commodities in his own conveyance, but if he accept the terms of the company, and go with them, it becomes a matter of contract, and it is lawful for the company to accept the compensation. But does it follow that the state of Pennsylvania can prevent me from going into Philadelphia with my wagon load of commodities for sale, and then the state of New Jersey prevent me from returning into the state with my box of dry goods, or my barrel of sugar, or my load of guano, unless I pay a tax on myself and commodities, on each side, for the privilege of so doing? No one, I think, will contend for this. It is the very thing which the national constitution intended to prevent; and if the tax cannot be assessed directly on me and on my merchandise, what better pretence can there be for assessing the same thing against the person who owns the railroad, or the ferry boat, or the wagon and horses, which I employed to carry me and my goods the one way and the other.

Another answer to the idea, that precedent for imposing transit duties on corporations is to be found in different states is, that these things are all matters of contract, voluntarily entered into between the states on the one side, and the companies on the other. The companies offer to pay the state for the privileges granted, and this is done generally by the payment of a definite sum of money, or by contribu-

State v. Delaware, Lackawanna, and Western R. R. Co.

ting a specific portion of their earnings, or in some other way. Neither party is bound to accept the terms; but if they do so it is a voluntary matter, and the enforcement of it is not illegal, bearing in mind always that the contracts confine themselves to the state where the contract is made. If the attempt be made to go beyond the state, the transaction would probably be illegal, notwithstanding its voluntary character.

But in the case before us it is not confined to the state. It is not voluntary on the part of the company, nor is it a contract of any kind. On the contrary it is involuntary. It has no pretence of agreement about it, and it relates exclusively to transactions with persons and property of other states. There is no analogy, therefore, between the transactions referred to and the case before us.

It will be seen, I think, by a careful examination of all the cases, that the Supreme Court has been extremely cautious in attempting to interfere with the legislation of any of the states, and has only done so when compelled by the supreme law of the land. And while the state tribunals should not yield up to the general government any of the rights which belong to the states, it does not seem wise to attempt a useless conflict for the mere purpose of showing state independence, when it is morally certain that the Supreme Court, in accordance with its former decisions, will reverse the decisions of such state tribunals.

I think, therefore, that this claim on the part of the state against the railway company cannot be sustained, for the reason that our legislature had no power to pass the law under which the claim is made.

In the case of the Delaware, Lackawanna and Western Railroad Company, which was argued at the same time as the case with the Erie Railway Company, the same questions and principles precisely are involved, so far at least as the questions which I have endeavored to consider are concerned, and the conclusion in both cases should be the same.

State v. Delaware, Lackawanna, and Western R. R. Co.

A majority of the court being of opinion that the tax or duty imposed upon the said corporations was rightfully imposed, and that the law which authorized it was not an infringement of the constitution of the United States.

JUDGMENT for the State was ordered, in both cases, for the amounts severally agreed on.

CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

AT JUNE TERM, 1860.

ADAMS AND TRAPHAGEN v. WILLIAM B. ROSS.*

1. A deed made by A. B., in consideration of love and affection and of one dollar, to C. D., wife of E. F., in which the said A. B. doth grant, bargain, sell, alien, remise, release, and confirm certain real estate to the said C. D., during her natural life, and at her death to her children which may be begotten of her present husband: to have and to hold the said premises unto the said C. D. for and during her natural life, and at her death to her children which may be begotten of her present husband, E. F., and containing covenants of seizin and general warranty, which are made by the grantor for herself and her heirs with the grantee and her heirs and assigns, conveyed to the grantee an estate for life only, with a remainder vested in G. H., a child of the said C. D., for life, subject to open, and let in afterborn children to the same estate.
2. The estate created was not an estate in fee or in fee tail, there being in the grant no words of inheritance or procreation.
3. The covenants warranting the premises to C. D. and her heirs did not enlarge the estate, nor pass by estoppel a greater estate than that expressly conveyed.
4. A warranty attaches only to the estate granted, or purporting to be

*This case should have appeared in the last volume of the Law Reports, but the opinion was not received in time for publication by the late reporter.

Adams v. Ross.

granted. If it be a life estate, the covenantor warrants nothing more; the conveyance being the principal, the covenant the incident.

5. In the construction of a deed, the question is, not what estate did the grantor intend to pass, but what estate did he pass by proper and apt words. No expression of intent, no amount of recital showing the intention, will supply the omission.
6. A mortgage made after the conveyance, and while the said C. D. was a minor, created no valid charge on the estate against the said C. D.
7. The grant made to C. D. was within the provisions of an act for the better securing the property of married women, passed March 25th, 1852, the deed being subsequent to the act.
8. The husband not entitled to curtesy in the premises on surviving his wife, the grantee.

Error to the Supreme Court.

On the 9th September, 1854, Anna V. Traphagen conveyed, by deed, to Catharine Ann V. B. Adams, wife of Alonzo W. Adams, certain lots and real estate, situate in Jersey City, for and in consideration of natural love and affection and of one dollar paid. The terms used in the deed were, "grant, bargain, sell, alien, remise, and release and confirm, unto Catharine Ann V. B. Adams, wife of Alonzo W. Adams, all that, &c., situate, &c., for and during the natural life of the said Catharine, and at her death to her children which may be begotten of her present husband, Alonzo W. Adams."

The deed contained covenants of seizin, for quiet enjoyment, against encumbrances, for further assurance and of warranty, which covenants were made by the grantor, for herself and her heirs, with the grantee, her heirs and assigns.

When the deed was made, the said Catharine Ann V. B. Adams was a minor; and on the 13th day of October, being still a minor, she joined her husband in a mortgage on the premises to William B. Ross, to secure the payment of the sum of \$6000.

A part of the premises was afterwards, under the authority of law, condemned for the benefit of the Erie Railway Company, the assessed value of which, being \$3061, was brought into the Supreme Court for distribution among

Adams v. Ross.

the parties, according to their respective rights, the money representing the whole value of the land taken.

The parties interested were heard before the court, in June term, 1858, on an application of Ross, the mortgagee, to be paid his mortgage out of the money in court.

The main question was the construction to be given to the deed made by Anna V. Traphagen, to Catharine Ann V. B. Adams, on the 9th September, 1854. After full argument of that question, and all others involved in the application, the court held that the estate granted by the deed was an estate in fee tail in Catharine Ann V. B. Adams and the heirs of her body; that her husband, Alonzo W. Adams, was tenant by the curtesy initiate; that the mortgage to William B. Ross on the interest of Mrs. Adams was void as to her, but was a lien upon the estate of her husband, he surviving her. See *Ross v. Adams*, 4 *Dutcher* 160, for the opinion of the court.

An order was made conforming to these views of the court, and thereupon a writ of error was brought by Ross and Traphagen to remove the order into this court for revision.

The cause was argued at February term, 1860.

For the plaintiff in error, *A. O. Zabriskie*.

For the defendant, *J. P. Bradley*.

At June term, 1860, the following opinion was read by

WHELPLEY, J. This writ of error brings up for review the judgment of the Supreme Court, giving a construction to a deed, dated the 9th of September, 1854, between Anna V. Traphagen, of the first part, and Catharine Ann V. B. Adams, wife of Alonzo Whitney Adams, of the second part, by which the grantor, in consideration of natural love and affection and of one dollar, conveyed to the grantee the premises in the deed described. The operative words are grant, bargain, sell, alien, remise, release, convey, and con-

Adams v. Ross.

firm unto the said party of the second part, for and during her natural life, and at her death to her children which may be begotten of her present husband: to have and to hold the above described premises unto the said party of the second part for and during her natural life, and at her death to her children which may be begotten of her present husband, Alonzo W. Adams.

The deed contains covenants of seizin, for quiet enjoyment, against encumbrances, for further assurance and of warranty.

These covenants are made by the grantor for herself and her heirs with the party of the second part, her heirs and assigns.

Mrs. Adams, at the date of the conveyance to her, was a minor. On the 12th October, 1855, she, with her husband, executed a mortgage to secure the payment of \$6000, in one year from date, upon the premises conveyed to her. She was then nineteen. The mortgage was to Ross, the applicant in the Supreme Court.

The Erie Railway Company, under the provisions of an act of the legislature, took a part of the land in question, and hold it in fee simple. The value of the land taken has been ascertained at \$3061; that is now in the Supreme Court, to be awarded to the parties entitled to it, and who they are must depend upon the true construction of the deed.

What, then, are the rights of Mrs. Adams, her husband and children, one having been born of the marriage since the conveyance; and what, if any, are the rights of Ross, the mortgagee, to the money in court.

The Supreme Court held, that the estate granted by the deed was an estate in fee tail special in Catharine Adams and the heirs of her body by her present husband; that her husband was entitled to curtesy; that the mortgage to Ross on the interest of Mrs. Adams was void as to her, but was a lien upon the estate of her husband, in case he survived her.

This decision was reached by interpreting the word "children," in the deed, as equivalent to "heirs," calling in the

Adams v. Ross.

covenants in aid of that interpretation, as throwing light upon what the court called the intention of the grantor.

The Supreme Court was right in holding the first estate conveyed to Mrs. Adams, not a fee simple; the express limitation of the estate to her during life, and after her death to her children, forbade any other conclusion. The covenant, warranting the land to her and her heirs general, cannot enlarge the estate, nor pass by estoppel a greater estate than that expressly conveyed. A party cannot be estopped by a deed, or the covenants contained in it, from setting up that a fee simple did not pass, when the deed expressly shows on its face exactly what estate did pass, and that it was less than a fee. *Rawle on Cov. for Title* 420; *Blanchard v. Brook*, 12 *Pick.* 67; 2 *Co. Lit.* 385, b.

Lord Coke expressly says: but a warranty of itself cannot enlarge an estate; as if the lessor by deed release to his lessee *for life*, and warrant the land to the lessee and his heirs; yet doth not this enlarge his estate.

Justice Vredenburg, in his opinion, admits this to be law. He says, although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were used. What is that but enlarging what would otherwise be their meaning? If without explanation they are insufficient to pass the estate, does not the explanation enlarge their operation?

The learned judge, in his elaborate opinion, says: from these covenants, it is demonstrated that, by the terms children by her present husband, the grantor intended the heirs of her body by her present husband. It follows, from this argument, that although the conveying part of the deed may not contain sufficient to convey the estate as a fee simple, for example, yet that if the covenants show an intent to pass a fee simple, it will pass.

The argument is, that the words of conveyance and covenant must be construed together. If the covenants look to the larger estate, that will pass upon the intent indicated. Children are said to be equivalent to heirs, because she war-

Adams v. Ross.

ranted to her heirs; and the heirs are said to be not heirs general, because she called them children.

The inconsistency between the conveyance and covenant shows mistake in the one or the other. The safest rule of construction is that propounded by the Supreme Court; that the quantity of the estate conveyed must depend upon the operative words of conveyance, and not upon the covenants defending the quantity of estate conveyed.

Starting with that premise, it seems difficult, nay impossible, to reach the conclusion, that the covenants are to be looked to in the interpretation of the conveyance, as such.

The covenants only attach to the estate granted, or purporting to be granted. If a life estate only be expressly conveyed, the covenantor warrants nothing more. The conveyance is the principal, the covenant the incident. If they do not expressly enlarge the estate passed by the operative words of the deed, I cannot perceive upon what sound principle of construction they can have that effect indirectly by throwing light on the intention of the grantor. In the construction of a deed of conveyance the question is, not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital, showing the intention, will supply the omission, although it may preserve the rights of the party under the covenant for further assurance or in equity upon a bill to reform the deed.

The object of the covenants of a deed is to defend the estate passed, not to enlarge or narrow it. To adopt, as a settled rule of interpretation, that deeds are to be construed like wills, according to the presumed intent of the parties making them, to be deduced from an examination of the whole instrument, would be dangerous, and, in my judgment, in the last degree inexpedient. It is far better to adhere to the rigid rules established and firmly settled for centuries, than to open so wide a door for litigation, and render uncertain the titles to lands. The experience of courts in the construction of wills, the difficulty in getting at the real in-

tent of the party, where imperfectly expressed, or where he had none; the doubt which always exists in such cases, whether the court has spelt out what the party meant, all combine to show the importance of adhering to the rule, that the grantor of a deed must express his intent by the use of the necessary words of conveyances, as they have been settled long ago by judicial decision and the writings of the sages of the law. Upon this point, it is not safe to yield an inch; if that is done, the rule is effectually broken down. Where shall we stop if we start here?

Littleton says: tenant in fee simple is he which hath lands or tenements to hold to him and his heirs for ever. For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase: "to have and hold to him and his heirs." For these words, "his heirs," make the estate of inheritance. For if a man purchase lands by these words, "to have and to hold to him for ever," or by these words, "to have and to hold to him and his assigns for ever," in these two cases he hath but an estate for life, for that there lack these words, "his heirs," which words only make an estate of inheritance in all feoffments and grants.

"These words, 'his heires,' doe not only extend to his immediate heires, but to his heires remote and most remote, born and to be born, *sub quibus vocabulis 'hæredibus suis' omnes hæredes, propinqui comprehenduntur, et remoti, nati et nascituri*, and *hæredum appellatione veniunt, hæredes hæredum in infinitum*. And the reason wherefore the law is so precise to prescribe certaine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion." *Co. Lit.*, vol 1, 1 a, 8 b; 1 *Shep. Touch.* 101; *Com. Dig.*, tit. *Estate A*, 2; *Preston on Est.* 1, 2, 4, 5; 4 *Cruise's Dig.*, tit. 32, c. 21, c. 1.

There are but two or three exceptions to this rule. The cases of sole and aggregate corporations, and where words of reference are used "as fully as he enfeoffed me." A gift

Adams v. Ross.

in frank marriage, &c., which are to be found stated in the authorities already cited.

These exceptions create no confusion; they are as clearly defined and limited as the rule itself.

The word "heirs" is as necessary in the creation of an estate tail as a fee simple. 1 Co. Lit. 20, a; 4 Cruise's Dig., tit. 32, c. 22, § 11; 4 Kent's Com. 6; 2 Bl. Com. 114.

This author sets this doctrine in clear light. He says: As the word heirs is necessary to create a fee, so, in further limitation of the strictness of feodal donation, the word body, or some other word of procreation, is necessary to make it a fee tail. If, therefore, the words of inheritance or words of procreation be omitted, albeit the other words are inserted in the grant, this will not make an estate tail, as if the grant be to a man, and *his issue* of her body, to a man and *his seed* to a man and *his children* or *offspring*, all these are only estates for life, there wanting the words of inheritance.

The rule in Shelley's case, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, that always in such cases the word heirs are words of limitation, and not of purchase. 1 Rep. 93; * 4 Cruise's Dig., c. 23, § 3, tit. 32, requires the use of the word heirs to bring it in operation.

No circumlocution has been ever held sufficient. It is believed no case can be found where this rule has been held to apply, unless the word heirs has been used in the second limitation.

Neither the researches of the learned judge who delivered the opinion of the Supreme Court, nor those of the very diligent counsel who argued the case here, have produced a case decided in England or in any state of this Union abiding by the common law, where, in a conveyance by deed, the word children has been held to be equivalent to heirs. That this has been determined in regard to wills is freely conceded, but that does not answer the requisition. The

* *Shelley's Case*.

Adams v. Ross.

reasoning of the Supreme Court is, to my mind, entirely unsatisfactory. In the administration of the law of real estate, I prefer to stand *super antiquas vias, stare decisis*; to maintain the great rules of property, to adopt no new dogma, however convenient it may seem to be. The refined course of reasoning adopted in the face of so great a weight of authority rather shows what the law might have been, than what it is.

I am utterly unprepared to overturn the common law, as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent, and all the judges who have administered it for three centuries, and to adopt the dogma, that intention, not expression, is hereafter to be the guide in the construction of deeds. That would be as unwarrantable as dangerous.

Under this deed, Mrs. Adams took an estate for life, which was not enlarged by the subsequent limitation to a fee tail. The remainder vested in Anna Adams, the child of the marriage, for life, subject to open and let in afterborn children to the same estate.

The deed operated as a covenant to stand seized. The proper and technical words of such a conveyance are, stand seized to the use of, &c.; but any other words will have the same effect, if it appear to have been the intention of the parties to use them for that purpose. The words bargain and sell, give, grant, and confirm, have been allowed so to operate. 4 *Cruise, tit. 32, c. 10, § 1, 2.*

By such a covenant, an estate may be limited to a person not *in esse*, if within the considerations of blood or marriage. *Fearne on Rem.* 288; 1 *Rep.* 154, *a*; 1 *Preston on Est.* 172, 176; 4 *T. Rep.* 39, *Doe v. Martin.*

This deed, on the face of it, expresses the considerations of natural love and affection, as well as the money consideration of one dollar.

It follows, from these considerations, that Adams is not entitled to curtesy in the lands on surviving his wife. The mortgage to Ross created no valid charge on the estate against Mrs. Adams, she being a minor when it was executed.

Adams v. Ross.

Mrs. Adams' interest in the land was subject to the provisions of the act for the better securing the property of married women, passed March 25th, 1852; the deed to her was after this act passed.

This was clearly a gift or grant, within the meaning of the act. The legislature did not intend to limit the benefits of the act to property conveyed by a deed operating as a gift or grant; all the ordinary modes of acquiring property by deed were intended by the use of the terms gift, grant. The reasoning of Justice Vredenburg upon this point is conclusive. Upon the determination of the respective life estates, the land reverts to Miss Traphagen.

The judgment of the Supreme Court must be reversed. The money in court must be invested for the benefit of Mrs. Adams for life, and after her death for the benefit of the surviving children of the marriage, in equal shares, during their respective lives, and at their deaths respectively, their several shares must be paid to Miss Traphagen, or if she be then dead, to her heirs or devisees.

Judges COMBS, GREEN, RISLEY, VAN DYKE, WOOD, CORNELISON, HAINES, and SWAIN concurred in reversing the order of the Supreme Court.

For affirming—None

Whereupon the following order or judgment was entered :

“This cause having been argued at the last term of this court, by the counsel of both parties, upon the reasons assigned for reversal, and the court having inspected the record and proceedings, and duly considered the same, and being of opinion that the deed executed by Anna V. Traphagen to Catharine Ann V. B. Adams for the lands out of which the sum paid into court arose, conveyed to the said Catharine Ann V. B. Adams an estate for life only, and that her husband, Alonzo W. Adams, is not entitled to any curtesy or any other estate therein; and that, after the death of the

Adams v. Ross.

said Catharine Ann V. B. Adams the same would go to the children begotten of her body by her husband, Alonzo W. Adams, equally to be divided, if more than one, for the life of each of said children respectively, and that the reversion thereof remains in the said Anna V. Traphagen: it is ordered, adjudged, and decreed, that the judgment of the said Supreme Court be reversed, set aside, and for nothing holden; and that the record be remitted to the Supreme Court, with directions to cause the sum paid into court to be invested under the control and direction of said court, and that the interest thereof, during the life of the said Catharine Ann V. B. Adams, be paid to her for her separate use, and at her death be paid to her children begotten of her by her husband, Alonzo W. Adams, in equal shares, if more than one, for their respective lives, and at the death of such children, respectively, the principal sum be paid to the said Anna V. Traphagen. On motion of A. O. Zabriskie, of counsel with plaintiffs in error."

CITED in *Black v. Delaware and Raritan Canal Co.*, 7 C. E. Green 418; *Lounsberry v. Locander*, 10 C. E. Green 558.

CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

AT NOVEMBER TERM, 1862.

HENRY V. HOAGLAND v. ABRAHAM VEGHITE.

An agreement, whereby the plaintiff granted a right to the defendant to erect a mill dam, and stop a ditch, on his land, and the defendant agreed that all damages sustained should be paid by him, held to mean such damages as the plaintiff might from time to time sustain. The case of *Van Schoick v. Canal Company*, *Spencer* 24, held not applicable.

The opinion of the Supreme Court will be found in 5 *Dutcher* 125.

For the plaintiff, *S. B. Ransom* and *R. S. Field*.

For the defendant, *M. Beasley*.

The opinion of the court was delivered by

ELMER J. The judgment of the Circuit Court in this case was reversed by the Supreme Court, upon the ground that, by the true construction of the agreement between the parties, made July 23d, 1838, the plaintiff's right to have an appraisement of the damages sustained by him was complete

Hoagland v. Veghte.

immediately upon the granting of the privileges thereby conceded to him, and that therefore but one appraisalment was authorized, which when made, was final and conclusive. I cannot concur in this opinion.

The plaintiff granted to the defendant, for a nominal consideration, a right to enter upon his land, erect a mill dam, and stop an existing ditch; and the defendant covenanted, that all damages sustained by the plaintiff, by reason of the privilege and authority granted, should be paid by him, which damages were to be appraised by disinterested persons, selected one by each party; and in case they could not agree, they were to choose a third, whose report, or the report of any two of them, should be final and conclusive. This agreement is loosely and inartificially drawn, no time or manner of using the privileges granted being mentioned, nor is it specified when the damages are to be assessed. The object undoubtedly was to place the defendant in a different situation from that of a mere trespasser. He had conferred on him an absolute right to use the plaintiff's land, by entering on it for the purpose of building and maintaining his dam, and could not be compelled to pay damages upon the principle of requiring him to remove it, but only such actual damages as the owner might sustain. Since, in the nature of things, such damages would accrue from time to time, as the work progressed, or as its effect was developed, it would seem but reasonable that they should be appraised from time to time as they occurred. No other proceeding could do the plaintiff justice; and that this mode of proceeding involved no injustice or hardship to the defendant is manifest from the fact, that three different appraisements have been made without the slightest objection on his part. Indeed nothing can be plainer than that the parties to this agreement both understood that it provided for the damages being appraised and paid after they had been sustained. This, indeed, is the literal meaning of its language. To hold that by the phrase, "all damages sustained," was meant such depreciation in value of the plaintiff's lands, by the fact of his granting cer-

Hoagland v. Veghte.

tain privileges and rights to the defendant, and before it could even be known how they would be exercised, it seems to me would be to hold what would be unreasonable and unjust to both parties, and what they could not have intended.

The case of *Van Schoick v. The Delaware and Raritan Canal Company*, *Spencer* 249, is relied on as in point. That, however, was a case differing from this in essential particulars. The question was as to the nature and effect of an assessment of damages, provided for in the charter of the company, for taking a portion of the plaintiff's land very particularly described, and constructing thereon a canal, all to be held for its exclusive use, against the consent of the owner. The judge who delivered the opinion of the court considered the words "damages sustained" as used in the law, although in the past tense, and therefore properly meaning such damages as had at the time accrued, to have a different meaning, because the company had no right to take the land or construct the canal, or in any wise affect the owner's interest or property, till the same had been valued, and the damages assessed. The law, he said, clearly contemplated such prospective damages as might arise.

In the agreement now under consideration there is nothing to qualify the proper meaning of the language employed, and to show that prospective damages were contemplated. Had an appraisement been attempted upon that principle, there can be little doubt the defendant would have felt himself quite as much aggrieved as the plaintiff now does by that adopted at this late day by the Supreme Court. There had been three awards for damages, before the present proceedings commenced, without objection by the defendant. The last of these, it appears, was brought before the Supreme Court, and there held to be good for all damages not before adjudicated. 3 *Zab.* 92. When the proceedings now before us were commenced, the plaintiff, by his counsel, objected that final damages, including the whole value of the land injured, had been awarded and paid, but he did not

Hoagland v. Veghte.

advance the principle, that there could be only one appraisal.

The declaration claimed damages which had been sustained after the making of the last award, and upon the construction of the agreement above stated, was good. Three of the pleas demurred to set up the several awards as conclusive, and were no good answer to the declaration. The sixth plea, which was also demurred to, set up as a bar that the defendant refused to join in selecting an arbitrator, because the plaintiff refused to make a further specification of the damages claimed by him. This same defence was urged on the trial of the issues in fact, and the judge having charged the jury that the refusal of the plaintiff to specify what damages he claimed was no justification for the defendant declining to select an arbitrator, a bill of exceptions was sealed.

It is clear that the defendant was under no obligation to choose an arbitrator, if the plaintiff had been in fact awarded all the damages he had sustained; but this was a matter to be settled by the arbitrators, who would have been bound carefully to exclude all damages upon which the former arbitrators had adjudicated, or upon which, under the submission, they ought to have adjudicated. But there is nothing in the agreement, or in the nature of the case, which required the plaintiff to make a formal specification of his damages.

Another error was assigned, for the refusal of the judge to charge the jury, "that the damages to be assessed were those arising, in consequence of the dam, to the freehold, and not for the loss or damage to crops which the land might have produced, if not soaked or otherwise injured."

It appears, by the bill of exceptions, that the plaintiff offered evidence to prove that the quantity of broken and useless land, at the time of the commencement of the suit, was considerably greater than at the date of the last award; that the quality of the crops had deteriorated since the same date, and that the action of the water, caused by the erection of the dam, had permanently injured the freehold by

Hoagland v. Veghte.

washing the surface and by soakage. There does not appear to have been any objection to this evidence, and the charge asked for was, that damages might properly be assessed for those arising to the freehold, but not for loss or damage to crops which the land might have produced, if not soaked or injured. I confess I am unable to perceive the distinction. Deterioration in the quality of the crops was a damage to the land, and the extent of the deterioration afforded one means of ascertaining what was the amount of the damage to the freehold.

Being of opinion that there was no error in the record of the Circuit Court, but that the Supreme Court erred in reversing the judgment, I think the judgment of the Supreme Court must be reversed, and the judgment of the Circuit Court in all things affirmed.

For reversal—Judges COMBS, CORNELISON, ELMER, GREEN, KENNEDY, SWAIN, WOOD.

For affirmance—Judge VREDENBURGH.

Judgment reversed.

CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

AT MARCH TERM, 1863.

THE MAYOR AND COMMON COUNCIL OF JERSEY CITY v.
THE STATE, JOHN HOWETH ET AL., PROSECUTORS.

1. A *certiorari* to remove and set aside an assessment for improving, curbing, and guttering a street, which the prosecutors allege encroaches on their property, is not the proper mode of trying the title of the prosecutors to the land in question.
2. The proceedings of surveyors of the highways in vacating part of a street which had been dedicated to public use, but never recognized as a public highway by lawful authority, held to be void. (See 1 *Beasley* 299, *Holmes v. Jersey City*.) The Court of Common Pleas cannot appoint surveyors to vacate a mere act of dedication.
3. The Supreme Court cannot, upon affidavits taken upon a *certiorari* to remove an assessment, either properly or conveniently try title to lands, and settle disputed facts involving a determination of questions of fraud and intention.
4. An assessment will not be set aside merely because the money has been expended upon land not properly subjected to public use.
5. A notice of intention to pave a street, unless otherwise expressed, refers to a street as it is *de jure*.
6. The right of reconsidering lost measures inheres in every body possessing legislative powers.

Error to the Supreme Court.

Jersey City v. State, Howeth, pros.

A *certiorari* was sued out of the Supreme Court, at the instance of John Howeth *et al.*, prosecutors, against the Mayor and Common Council of Jersey City, to remove into that court an assessment made under an ordinance of the common council for paving and improving Bright street. The Supreme Court set aside the assessment, as to the prosecutors, principally for the reason that the ordinance had not been regularly passed, and was not legal. (See *ante* 93.)

The cause was removed into this court by writ of error.

For the plaintiff in error, *A. D. McClelland* and *A. O. Zabriskie*.

For the defendant, *J. Flemming* and *W. B. Williams*.

CHIEF JUSTICE. When this assessment was made, Bright street was *de facto* eighty feet wide. To that width it had been filled in, curbed, guttered, and the sidewalks laid, in pursuance of the ordinance passed September 20th, 1859. Before the work was done, the prosecutors had submitted to the claim of the city to have their fences on the south side of the street, within that width, removed. After their removal, the work was done without further objection by the prosecutors; indeed one of them, John Coar, proposed for the work. On the 27th November, 1860, more than a year after the passage of the ordinance directing the work to be done, the assessment was made, which was removed into the Supreme Court for review. On the 11th December, 1860, the prosecutors remonstrated against its confirmation, for reasons affecting only the mode of making, and the principles upon which the assessment was made, not alleging that the improvement had been illegally ordered. The remonstrance itself shows that they had submitted to the action of the city council in regard to the removal of all encroachments within the line of the street at its width of eighty feet; indeed they complain, that they have not been allowed compensation for work done where it was filled in at the width of sixty feet.

Jersey City v. State, Howeth, pros.

On the 28th February, 1861, a *certiorari* was allowed and issued on application of the prosecutors, to remove, in the language of the writ, the assessment, and all the proceedings touching and concerning the same, into the Supreme Court; and according to the practice of the court, reasons were assigned for setting it aside, none of which allege that the ordinance was illegal because it provided for improving the street at the width of eighty feet.

In this posture of the case, the principal reason urged for setting the assessment aside was, that Bright street had been illegally ordered improved, as prescribed by the ordinance, at the width of eighty feet, whereas in fact and in law the street was only sixty feet wide; and that in doing the work, the property of the prosecutors on the street had been encroached upon, and taken out of their possession and comprehended within the street, thus adding to the street, on its south side, a strip of land twenty feet in width, to which the city had no right.

A *certiorari* to review the assessment, sued out under such a state of facts, was not a proper mode of trying the title of the prosecutors to this strip, or whether it still remained subject to its original dedication as a street.

The city claimed that Grand street, the name of which at this point has been changed to Bright street, had been dedicated as a street eighty feet wide, in the year eighteen hundred and thirty-five, by Van Vorst, who mapped out the property through which it ran into city lots, and laid down on the map the street eighty feet wide; that he sold lots by the map with reference to the street so laid down, and to make the act of dedication to public uses unequivocal, deposited the map, as a public record, in the county clerk's office, while the land was still a part of the township of Van Vorst.

On the other hand, the prosecutors insisted that the city had accepted the dedication of the street only as sixty feet wide, not including this strip of land claimed by them, and,

Jersey City v. State, Howeth, pros.

as such, had ordered it filled, by an ordinance passed in 1852, the year after the incorporation of the city.

After the act of dedication, by Van Vorst, of the land, and before it became subject to the provisions of the city charter, it still being in the township of Van Vorst, in 1846, surveyors had been appointed under the highway act, *Nix. Dig.* 700,* who, by their certificate and return, had vacated a strip of the road on the south side twenty feet wide, being the land in dispute, thereby assuming the authority to annul Van Vorst's act of dedication *pro tanto*, although the street had never been recognized by public authority as a public highway.

This proceeding of the surveyors, this court, in the case of *Holmes v. Jersey City*, decided in November, 1857, 1 *Beasley* 299, declared null and void for want of jurisdiction in the Court of Common Pleas to appoint surveyors to vacate a mere act of dedication, reversing the decision of the Chancellor, holding that the act of vacation was valid. The facts of the case will be found fully stated in the report, and need not be repeated.

Upon the argument, counsel discussed elaborately the points made by them; that by this action, under these facts, the city was estopped, legally or equitably, from claiming this strip as a part of the street, or that at least the facts showed an acceptance by the city of the acts of dedication only to the extent of a street sixty feet wide, and a rejection of the residue of the dedication.

If the prosecutors wished to try these mixed questions of law and fact, they have not taken the proper mode or time to do so. They should have done that by an action of trespass, or have refused to give up possession, and compelled an action of ejectment, or have, in some other way, made a direct issue with the city upon their claim to the land as private property, discharged of the consequences of the dedication.

The attempt has been made in this suit, to try and deter-

* *Rev.*, p. 989.

Jersey City v. State, Howeth, pros.

mine a question of title to lands not directly, but collaterally, and that too without the intervention of a jury. A determination of the case in their favor upon this point would not give the prosecutors the possession of the lands or settle the controversy. The opinion of the court upon the facts, as they appear here, would not necessarily conclude the parties to a common law action, where the facts might be different as proved.

The Supreme Court could not, upon affidavits taken upon an assessment *certiorari*, either properly or conveniently try title to lands and settle disputed facts, involving the determination of questions of fraud and intention.

The theory upon which the prosecutors assumed that these questions were involved in the case seemed to be this: that the assessment was null and void if made for paving a part of a street the city had not acquired the right to as a street; that this was a misapplication of the money, and therefore they could not be assessed to pay it. If this position should be held sound, it is much to be feared that few assessments could be collected. To permit such questions to be raised in such a mode would be not only extremely inconvenient in practice, but seems to be the assumption of a rule of law clearly unsound.

If these prosecutors should be permitted to raise these questions in this way, no reason is perceived why any other property holder assessed could not do the same; for, on the theory assumed, the right to do so does not rest upon the ownership of land encroached upon.

If an assessment may be set aside merely because the money has been expended upon land not properly subjected to public use, the extent of the infringement is obviously immaterial—it would not matter whether it was six inches or twenty feet.

The width of the street, as paved, could not be questioned upon the *certiorari*. *State v. Jersey City*, 5 *Dutcher* 441.

This view of the case disposes of the point discussed on the argument, whether the burthen of proof, as to the width of

Jersey City v. State, Howeth, pros.

Bright street, lay upon the city or upon the prosecutors; the latter alleging that upon an assessment *certiorari*, the city was bound to support the assessment by proof of the legal width of the street. If they were bound to do so in this case, why would they not be compelled to do so in all cases? This claim of the prosecutors seems to set in clear light the absurdity of the whole attempt to try the title to the land upon *certiorari*.

Although the court will not, for the reason stated, undertake to settle the rights of the prosecutors to the disputed lands, yet I am unwilling to let this case pass without expressing my dissent from the view expressed by the Supreme Court of our decision in *Holmes v. Jersey City*.

It was decided in that case, upon the facts then before the court, not only that the return of the surveyors was null, but that Bright street was legally eighty feet wide. This court so intended to decide; and after the cause was remanded to the Court of Chancery, a decree was entered, founded upon the opinion of this court, that the street was eighty feet wide.

The late Chief Justice, in delivering the opinion of the court, said: the proceedings of the surveyors, appointed by the Common Pleas of Hudson county, altering the width of Grand street (now at this point called Bright street) as originally dedicated and opened, were null and void, and that the street, until altered by competent authority, must be deemed and taken to be eighty feet wide.

Such is the effect of the dedication until the common council, by virtue of the power granted by the charter, shall alter the width of the street.

The same view was taken by this court of the effect of such a dedication in the case of *The Mayor, &c., of Jersey City v. The Morris Canal and Banking Company*, 1 Beasley 548. The opinions then expressed were necessary to the decision of the cause, and not mere *obiter dicta*, and were concurred in by the court. If therefore the question, whether Bright street was eighty feet wide when the ordinance passed

Jersey City v. State, Howeth, pros.

directing the improvement, properly arose for decision in this case, I can perceive no reason for coming to a different result from that arrived at in *Holmes v. Jersey City*. If the city, submitting to the authority of the return of the surveyors, and by mistake assuming it to be binding upon the city while it remained unreversed, worked the street only sixty feet wide, and the lot holders enclosed the residue of it within their lots, put fences around, and buildings upon the strip of land, such action, so founded upon mistake, cannot be regarded as a partial acceptance of the whole dedication, and a rejection of the residue.

If the doctrine of estoppel *in pais* can be applied to such a case, under any circumstances, which it is not now necessary to decide, no estoppel could arise where one of the parties to it—the city—acted not *sua sponte*, but in submission to supposed legal coercion, nor to a case of mutual mistake.

No act or conduct of the city authorities, while the vacating proceedings were supposed valid, can have any other interpretation than that of submission to legal authority. They cannot, for the same reason, be regarded as refusing to accept a dedication as a whole, a part of which both parties supposed was legally annulled.

While the city is in its nascent state, and before the streets are improved, little regard is had to strict street lines. Encroaching lot owners, sometimes for temporary convenience, and at other times intending permanently to acquire the lands, often build within the street lines; they did so in this case, but by so doing acquired no right of permanent possession or title.

The contrary doctrine would effectually destroy great public rights in all cities which, like Jersey City, depend upon the doctrine of dedication for the preservation of their parks and streets.

The effect of the Van Vorst dedication in 1835 has not been limited or impaired by any act, conduct, neglect, or acquiescence of the city, and Bright street is still eighty feet in width.

Jersey City v. State, Howeth, pros.

It was objected that no notice was given, as required by the charter, of the object of the ordinance as passed. It was conceded that a notice was given of an application for an ordinance to have Bright street, between Grove and Jersey street, improved. The ordinance, as passed, conformed to the notice, except that it expressed that Bright street was to be improved at its legal width of eighty feet. This is no variance. When a street is improved, the law implies that it is to be done at its legal width. The additional expression was surplusage; it was not necessary to state the width of the street, the thickness of the flagstones, or the size of the pebbles with which the paving was to be done.

Of necessity, a notice of intention to pave a street, unless otherwise expressed, refers to a street as it is *de jure*, unless it be the law that encroachments must be removed before the presentation of the petition for the improvement. The notice given located and defined the extent of the improvement; it is not bad because it did more.

To say that the ordinance was in effect to widen the street, assumes that the street was not *de jure* eighty feet wide, and that erections standing upon the twenty feet were upon the private property of the prosecutors; it has been already shown that the street was of right eighty feet wide.

The ordinance was to pave, first removing the obstructions, not widen it. The city could not proceed in any other way without admitting the right of the prosecutors to the land, and compensation for the encroaching improvements.

The judgment below was founded upon the position, that if the street had been encroached upon by buildings and fences within its limits, the proceeding must be to widen the street, or pave it as it was. It loses sight entirely of the question, whether the buildings and fences were lawfully within its limits or not; whether the lot holders were or were not encroachers; if they were, there was no necessity of any legal proceeding to increase the width; it was a question of labor, not law; nor were they assessed to pay for their own

Jersey City v. State, Howeth, pros.

ruin; if they were not encroachers, they should not have admitted they were by voluntarily yielding up the possession.

It was objected that the ordinance was at the first meeting lost, and the vote reconsidered, and laid upon the table, and passed at the next meeting. The right of reconsidering lost measures inheres in every body possessing legislative powers.

Equally untenable is the objection, that the ordinance was amended in the mode already mentioned; after reconsideration, the sense was in no essential respect changed.

The objections taken to the assessment itself are not sustained by the facts. The commissioners did determine the property benefited by the improvement, and described it sufficiently, and what proportion of the expenses should be borne by the several owners thereof; and they have stated that they made a map and schedule containing a full statement of the assessment, the several lots and property benefited, the several and respective amounts of such benefit, and the names of the owners of such lots and property, respectively, to which they refer as a part of their report.

It was also urged that the assessment was made upon what is called the frontage principle. If that mode properly distributed the benefits among the owners of the property benefited there can be no objection to its use.

The court has held that this principle must not be arbitrarily applied, without the exercise of judgment in each case. The principle is not necessarily wrong in all cases. That is as great an error as to assume it right in all cases.

For reversal—COMBS, CORNELISON, ELMER, HAINES, KENNEDY, FORT, SWAIN, WHELPLEY, WOOD. 9.

For affirmance—None.

Judgment of Supreme Court reversed.

CITED in *State, Moran, pros., v. Hudson City*, 5 Vroom 27-31; *State, Associates Jersey City, pros., v. Mayor, &c., of Jersey City*, 5 Vroom 44; *State, Pudney, pros., v. Passaic*, 8 Vroom 68.

CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

AT JUNE TERM, 1863.

JOHN R. PARSELL ET AL. v. THE STATE, JOHN M. MANN,
JOSHUA DOUGHTY, ET AL., PROSECUTORS.

1. Under the 2d section of the act concerning roads, *Nix. Dig.* 737, the courts of Common Pleas and Supreme Court are bound, as a legal necessity, to appoint the surveyors of the township through which the road is to run, unless it is to run through their lands, or unless the court, for some other reason in the exercise of a sound discretion, shall think they ought not to be appointed.
2. The simple fact, that the surveyors are taxpayers in the township, is not sufficient to exclude them, or to warrant the courts in refusing to appoint them. The supplement of 1850, making the townships liable to pay for lands taken for roads, furnishes no ground *in itself* to which the discretion of the courts can be applied. It may be an element, among other reasons, which, taken together, the court may deem sufficient to exclude the surveyors from appointment.
3. The Court of Common Pleas, having exercised their discretion in the matter of appointment, and having so certified in their order, it is not the subject matter of review in the Supreme Court.
4. If the grounds for exclusion can be inquired into, the court below must be called on to certify the facts in regard to them, before the testimony of witnesses can be resorted to. The evidence of one of the judges who made the order, is insufficient to contradict the language made use of by the whole court on the face of the order of appointment.

Parsell v. State, Mann et al., pros.

In the term of April, 1859, the Court of Common Pleas of the county of Somerset, upon application of John R. Parsell and others for the appointment of surveyors of the highways to lay out a road in the township of Bridgewater, in said county, appointed John P. Voorhees and Cyrenius T. Stryker, of the township of Branchburg; Israel H. Hill and John B. Brokaw, of the township of Hillsborough, and John N. Hoagland and Peter L. Suydam, of the township of Franklin, six surveyors of the highways of said county, for the purpose of laying out said road, "regard having been had to the appointment of the surveyors of the said township where the said road is applied for to be laid, whom the court, for sufficient cause, refused to appoint; which surveyors shall meet," &c.

The surveyors met, on the 6th day of June, and laid out the road as applied for, having adjudged the same to be necessary. They also made an assessment of the damages the owners of the land and real estate taken for the road would sustain by laying out the same, of all which return was duly made according to law.

These proceedings were removed into the Supreme Court by writ of *certiorari*, returnable to the term of June, 1861, at the instance of the State, John M. Mann, Joshua Doughty, and others being prosecutors—and thereupon the following reasons were assigned for setting them aside:

1st. Because the Court of Common Pleas, in the application of said surveyors, acted upon an erroneous principle, in excluding, as interested against said road, the surveyors of the township in which the road was proposed to be laid merely because of their residence in said township, and in appointing the surveyors of other townships, who were interested in laying the road, as sharers in whatever benefit the road would yield, while they contributed nothing to the burthens it imposed.

2d. Because real applicants for said road, including the persons in whose handwriting the application for the appointment of surveyors is written, and who employed counsel,

Parsell v. State, Mann et al., pros.

paid the fees of the surveyors, and who advocated the road in speeches before the surveyors, have had damages assessed to them, they not having signed the written application for the appointment of surveyors, in contravention of the spirit of the road act.

3d. Because the originators and real parties in such application paid certain of the surveyors who laid said road sums of money, as fees, that are not only more than the law allows, but unusual, unprecedented, and illegal.

4th. Because the surveyors, in laying out said road, acted upon an erroneous principle in laying the same, *viz.* that it is the duty of the public to render railroad crossings safe; whereas, by the charter of the Somerville and Easton Railroad Company, the crossing of whose road the road was laid to avoid, are bound so to cross the common roads by passages and bridges, over and under the same, as not to impede the use of the common roads.

5th. Because the said return is, in divers other respects, uncertain, defective, and illegal.

A rule was taken, on application of the plaintiff in *certiorari*, that the parties have leave to take affidavits, to be used on the argument of the case, and both parties examined witnesses under the rule. Evidence was produced to show, among other things, the ground taken by the court in refusing to appoint the surveyors of the township of Bridgewater to act in laying out the road.

The case was argued in the branch court, before Justices VAN DYKE and HAINES, at February term, 1861, and at the term of June following, the court ordered the proceedings of the Court of Common Pleas and of the surveyors to be reversed and set aside.

The opinion was delivered by Justice VAN DYKE, and as the case has not been reported, it is deemed proper to insert the opinion here, as showing fully and clearly the grounds on which the court placed their judgment.

VAN DYKE, J. The *certiorari* in this case is brought to

Parsell v. State, Mann et al., pros.

reverse the proceedings of the Court of Common Pleas, and also of surveyors of the highways appointed by them to lay out a public road in the county of Somerset, in the township of Bridgewater.

The first objection to the proceedings is, that the Court of Common Pleas refused to appoint the surveyors of the highways of the township in which it was proposed to lay the road simply and only because they were residents of that township, on the supposition, it is supposed, that they were interested in the assessments, if any, that should be made of the damages to the land taken. The order of the court states, that regard was had to the appointment of those surveyors, but that they refused their appointment for sufficient reasons. But that the court did exclude them expressly, and only on the ground of their being residents of the township, is not only clearly proved, but it is not denied or controverted in any way. The question, then, is fairly presented for our consideration, whether it is lawful or otherwise for the court, in all cases, to exclude the surveyors of the township through which it is proposed to lay the road, merely because they are residents of the township.

It is insisted, however, that this is a discretionary power, lodged with the Court of Common Pleas, to appoint the surveyors of the township, and that they are the exclusive judges of the sufficiency of the reasons on which they act, and that their determination in the matter is not subject to reversal or review. It is true, that court is authorized to determine what reasons should exclude the surveyors of such particular township or of any other township; and if we have no knowledge of the reasons or principles on which they act, we cannot properly interfere with their determination. But if the law requires the Court of Common Pleas to appoint particular surveyors, unless there be some sufficient reason to the contrary, and the court reject such surveyors, and furnish to us clearly the reason or principle on which they thus rejected them, and if that principle be clearly wrong, and contrary to the clear meaning of the act, this court is not only authorized,

Parsell v. State, Mann et al., pros.

but bound to reverse such decision. The discretion with which that court is clothed must be exercised according to law, and not contrary thereto. If they should reject the surveyors of a township from which they were required to take them, except for a sufficient reason, and they should reject them alone on the ground of religious belief, this court should not sustain such determination as legal, nor permit it to be practised, but should set such determination aside. So in the case before us. If the reason or principle on which the Court of Common Pleas rejected the surveyors of the township of Bridgewater be illegal, such as this court should not sanction, and which should not be tolerated in practice, this court is bound to reverse the proceedings, not only for the correcting of the mischief in this particular case, but for the government of the courts in all other similar cases. The question then is, whether the Court of Common Pleas was right or wrong in rejecting the surveyors of the township through which the road was to run simply because they were residents of that township. This was not the exercise of a discretion, but the adoption of an inflexible rule to be applied to all cases.

This question received some consideration in the case of *The State v. Atkinson*, 3 *Dutcher* 420, and so far as that case goes, it seems to sustain the decision of the Court of Common Pleas. That decision, so far as it is supposed to sanction that view of the case, we are asked to review, as not being correct in principle. If the question was distinctly presented in that case, and was carefully considered and decided, and especially if we consider it correctly decided, we should adhere to it, and again assert the principle. If, on the other hand, the case did not fully present the question—if it was only incidentally considered by a part of the court, and possibly not concurred in by the remainder of it, although there may have been a concurrence in a result, and especially if its correctness be questionable, I can see no reason why we should not so far reverse it, as to declare explicitly what the law is on the subject now, when we have it directly before us. In the case of *The State v. Atkinson*, the question

Parsell v. State, Mann et al., pros.

now under consideration was not before the court, so far as we can learn, at all. There was no complaint made there that the court either had or had not in fact appointed the surveyors of the township in which the road was to be laid. It did not appear, from the case, whether such surveyors had been appointed or not, and the question raised was not, and could not have been in that case, that the court had improperly rejected or improperly appointed the surveyors of that township, but the only question was on the order of the court itself, that it did not show on its face that the court had considered the question at all; in other words, the objection was, "It does not appear, *by the order*, that regard was had to the appointment of the surveyors of the highways of those townships where the said road was applied for to be laid out." The court held that that matter need not be set out on the face of the order. This is all that was decided, so far as this feature of the case is concerned. The question is one of some importance, and as it has never before been presented for decision, although somewhat discussed, it is proper that it should be examined and settled.

It seems impossible to doubt that the legislature, in the act concerning roads, imperatively required the Court of Common Pleas of the counties to appoint, on such applications, the surveyors of the townships through which the road was to run, unless it was to run through the lands of such surveyors, or unless they were excluded by some other legal reason such as should exclude any surveyor. And it seems equally free from doubt, that if the courts refuse to obey this requirement of the statute, except for the reasons contemplated, such refusal would be ground of reversal. The Court of Common Pleas, from deference, it is supposed, to the case of *The State v. Atkinson*, did refuse to obey this injunction of the act, and did refuse to appoint the surveyors of the township through which the road was to be laid, and so refused, for no one of the reasons contemplated by the act, but did so simply and only because they were surveyors of that township.

Parsell v. State, Mann et al., pros.

This provision of the law has never been repealed or disturbed since it was originally passed. It could only be repealed by the legislature doing so in express terms, or by the passage of a subsequent act, so in conflict with it that both could not stand, in which case the latter would prevail. But there is no such act. It is supposed that the supplement, passed March 1st, 1850, providing for the assessment of damages in behalf of the persons whose lands should be taken for the purposes of the road, in some way annuls or renders inoperative this requirement of the original act; but that supplement does not in terms repeal the former act, nor is there anything in it which is inconsistent with that act, in respect to the matter under consideration.

It is insisted that the power given by the supplement to assess and award damages to the landowners, which damages are to be paid by the taxpaying residence of such townships, renders the surveyors of such townships interested in the question, because they, as residents thereof, will be required to contribute to the payment of such assessment; but this in no way interferes or conflicts with the principle contained in the original act, for there never was a time since its passage that the surveyors of the townships were not interested, as taxpayers, in every road laid in their townships. No public road was ever laid out by public authority, constructed and kept in repair, including its bridges, &c., except at a yearly expense to the taxpayers of the township in which it is located; and the adding of the additional expense of paying for the land taken for the road does not change or introduce any new principle creating an interest in the surveyors, but only increases, to some extent, the burthens previously imposed upon them. The question was not first introduced by the supplement, that the inhabitants of a township should be taxed for the making and sustaining of each additional highway laid out in their township, but that the tax, in a particular feature, was liable to be increased. Instead of its being increased fifty cents a year by the laying out and maintaining a new highway, it is now liable to be increased,

Parsell v. State, Mann et al., pros.

for the first year, to one dollar, or over, for each taxpayer, and after that the same as if no assessment of damages had been made. The idea, therefore, that the surveyors of each township are affected primarily by the laying out of roads in their respective townships, is nothing new. It was always so. And all that can be said of the supplement is, that it may increase remotely, their interest in the laying out of new roads, but introduces no new principle which did not exist before.

The legislature, then passed the act requiring the surveyors of the townships in which the road was to run to be appointed, when it was as well known as it can be now, that they were interested as taxpayers in the laying out of such roads, and this must have been for some good and sufficient reason. Perhaps it was because, being better acquainted with the locality than strangers, they were better qualified to judge of the necessity for the road, or it may have been because the laying of all roads imposed a burthen, in the way of tax, on the inhabitants of the townships through which they were made, and that it was unjust to impose such tax, unless the people of the townships were represented in the tribunal imposing such tax. This latter reason is a very natural and important one, and if it be the one which governed the legislature, it is certainly a very strange construction of it to withhold the representation the moment the tax is to be increased. But whatever the reason may have been which caused the insertion of the provision, it is very certain that such reason still exists with all the force which it ever possessed ; and the legislature, never having repealed either the provision, or the reason for it, I certainly think we are not at liberty to disregard them, but, on the contrary, we are bound to see that they are enforced. I think, therefore, the obligation to appoint the surveyors of the townships through which the road is to be laid, is just as imperative as it ever was ; and the construction of the courts always was, and the practice always was, that the surveyors of these particular townships were to be appointed of course and as a legal ne-

Parsell v. State, Mann et al., pros.

cessity, unless the reasons to the contrary were such as should exclude any surveyor. But if the doctrine contended for be the right one, the surveyors of the townships, instead of being preferred, are for ever excluded, and can never in any such case be appointed, although the law, as it stands, requires that they should be. It never could have been intended, that the mere fact of the surveyors being residents of the townships to be affected should exclude them from the survey, for that is the very reason why they are to be appointed.

The principle contended for would place every township entirely at the mercy of outsiders, (for even the petitioners for the road need not reside in the township), who being strangers to their wants, and indifferent to their burthens, may inflict on them the most intolerable oppressions, not only against their will and consent, but without even the privilege of a voice in the matter. The rule also, if it applies to the appointment of surveyors, must of necessity apply to the appointment of freeholders to review the proceedings of the surveyors. They, too, must be taken from foreign townships; and the case before us furnishes a pretty striking exemplification of the danger and mischief of which I speak, for, upon looking at the return, we find that, in addition to the ordinary expenses, there are assessments to an amount of over \$1000 in going a distance of little over half a mile.

I think, therefore, that the Court of Common Pleas, in rejecting the surveyors of the township of Bridgewater, for the reason by which they were governed, committed an error, which it is our duty as well as our province to reverse.

Other reasons were urged in favor of a reversal; but as I deem the one already considered sufficient for that purpose, it is unnecessary to examine the others.

The judgment of the Supreme Court having been removed into this court, the said John Parsell and others, alleging error in the said judgment, prayed its reversal.

1st. Because the court, in and by their said judgment, did

Parsell v. State, Mann et al., pros.

determine that the return of the surveyors laying out said road was defective, null, and void, because the Court of Common Pleas of the county of Somerset, in appointing said surveyors to lay out said road, refused to appoint the surveyors of the township of Bridgewater, where the said road was proposed to be laid out.

2d. Because the said court, in and by their said judgment in setting aside said return, did determine that it was proper and right that the surveyors of the township where the road was applied for to be laid were not interested in the laying out, or otherwise, of such road by reason of their being taxpayers to such an extent as to exclude them from acting as such surveyors.

3d. Because the said court, in deciding said case and setting aside said return, did so on the ground that the surveyors of Bridgewater had been unlawfully excluded by the Court of Common Pleas from acting as surveyors in laying out the said road.

4th. Because there is error in the entry of the judgment by the Supreme Court.

5th. The general error.

For the plaintiffs in error, *H. V. Speer* and *A. O. Zabriskie*.

For the defendants, *J. P. Bradley* and *P. D. Vroom*.

OGDEN, J. A concise history of the entire proceedings in this matter, with an observance of dates, will present the questions which the court is required to settle.

On the 8th day of April, 1859, John R. Parsell, with sixteen others, freeholders and residents in the county of Somerset, made application, in due form, to the judges of the Court of Common Pleas of the county, for the appointment of six surveyors of the highways, to lay out a public road fifty feet wide, in the township of Bridgewater, in said county. On the 20th of April, the court granted their petition, and appointed the surveyors of the townships of

Parsell v. State, Mann et al., pros.

Branchburgh, Hillsborough, and Franklin, stating, in their order of appointment, that they had regard to the appointment of the surveyors of the township where the road was applied to be laid, whom, for sufficient cause, they refused to appoint. The six surveyors met at the place and time fixed in the order of appointment, and proceeded to view the premises; and having heard what was to be said for and against the road, did adjudicate the said public road to be necessary; and did lay out the same, and cause it to be marked at proper distances in the line thereof; and did order it to be opened for public use, on the 4th of October, 1859, and all signed a written return of their proceedings, dated June 6th, 1859. At the same time they made an assessment in writing of damages in favor of several parties, stating them therein to be owners of land taken for the road, and not applicants therefor.

A *caveat* was filed against recording the return, and at the next term of the court, freeholders were appointed to view the said road, under the 8th section of the act concerning roads. They met early in December, 1859, and proceeded to view the road, but the majority being in favor of leaving it undisturbed, they separated without making any certificate, as they were advised that it was not necessary for them to certify; and thereupon there should have been an order of the court for the clerk to record the return of the surveyors. If they had made a certificate, no application for a vacation of the road could have been made under one year after the recording; but as they neglected to certify, an application was made for the appointment of surveyors to vacate, and an appointment was made, as if the return had been ordered to be recorded, and the new surveyors met on the ground, in February, 1860, within two months after the view was had by freeholders. Those surveyors did not vacate or disturb the road. On the 28th of February, 1860, a writ of *certiorari* was awarded, directed to the judges of the Court of Common Pleas, to bring into the Supreme Court, on the first Tuesday in June, the application, appointment of sur-

Parsell v. State, Mann et al., pros.

veyors, their return and the assessment of damages, and the order to record, with all things touching and concerning the same. On the 30th of May, 1860, they sent up the papers, certifying therewith that no order for recording the return had been made by them.

In June term, 1860, on the return of the *certiorari*, a rule was entered in the minutes of the Supreme Court, that the parties have leave to take affidavits, to be used on the argument of the same.

On the 28th of June, reasons were filed in that court for setting aside the appointment, return, and assessment of damages.

Affidavits were taken, and exhibits were made, and in June term, 1861, the court ordered that the appointment of the surveyors, the return by them made, and all proceedings by them had and taken, should be set aside and made void, Justice Van Dyke delivering the opinion of the court. That order has been removed for review into this court by a writ of error.

The Supreme Court set aside the return of the surveyors upon one ground only, to wit, that the Court of Common Pleas acted on an erroneous principle in excluding, as interested against the road, the surveyors of the township of Bridgewater, wherein the road was applied to be laid, merely because of their residence in said township, and being taxpayers therein.

The first two assignments of error in this court refer to that view taken by the Supreme Court, and they set forth that the Supreme Court erred in determining the return to be null and void, because the Court of Common Pleas refused to appoint the surveyors of Bridgewater, and because the Supreme Court did determine, that the fact of surveyors being taxpayers in a township does not make them so interested in the road as to exclude them from acting as such surveyors.

The case presents two distinct matters for consideration.

First. The correct construction of a part of the 2d section of the act concerning roads.

Parsell v. State, Mann et al., pros.

Second. Whether it properly appeared before the Supreme Court that the Court of Common Pleas had disregarded the requirement of that section in making the appointment of surveyors.

The course of legislation in New Jersey on the subject of public roads, from the year 1675 to the present time, clearly shows that the laying out of roads was held to be a township business, and that officers resident in the township where a road was to be laid, were always considered to be proper persons to have a voice in the matter. In the act of 1675, two men were required to be appointed in each township in the province, for laying out roads therein. In 1716, all applications for roads were required to be made to the two surveyors of the town, who were directed to call to their aid the surveyors from two adjacent townships.

An act, passed in 1774, required applications to be made to the surveyors of the township where the road was proposed to be laid, and to the surveyors of the two nearest and adjacent townships, and it declared that at least one of the surveyors of the township in which the road was applied for should consent to the road and should sign the return. The mode of making applications for roads was changed by a supplement, passed in 1792, which directed that the application shall be made to the judges of the Court of Common Pleas, who were to appoint six surveyors of the county without restrictions. This act was repealed in 1799, by a new act then passed, which contained the same provision. The law stood thus until 22d of February, 1811, when the following language was introduced into the 2d section: "ever having regard to the appointment of the surveyors of the highways of those townships where the said road shall be so applied for to be laid, &c., provided that no surveyors shall be appointed through whose land the road may run."

Two decisions of the Supreme Court, one made in 1791, the other in 1792, reported in *Coe*, pages 55 and 128, gave a strict construction to the law, as it then stood. The court ruled, that it was fatal to a return of surveyors, because four

Parsell v. State, Mann et al., pros.

were not taken from adjacent townships; they said, that the law might occasion inconvenience, but that was exclusively a matter for legislative consideration. The judge used the following strong language: "We are here to declare the law, and cannot decide against the express words of it. The legislature has declared who are to be the judges, by unequivocal words. They are to be the surveyors chosen from the nearest townships; we have no authority to frame a proviso to the act, and to declare that, under certain circumstances and in peculiar cases, they may come from townships not the nearest: this would be to assume legislative powers."

In May term, 1812, on an application to the Supreme Court to appoint surveyors, the appointment of one of the surveyors of the township through which the contemplated road ran was objected to, and an affidavit was offered to be read, to prove that he had given an opinion as to the propriety of laying the road. The court said: the act of assembly makes it the duty of the court to appoint the surveyors of the town through which the road runs; one case excepted, which was not the one before them. It has been the clear policy of the legislature, in their different enactments on the subject of roads, to have the judgment of surveyors of the township through which a road was to run, expressed upon its necessity; and although the supplement of 1792 left the selection entirely within the control of the Court of Common Pleas, yet, in 1811, the legislature limited the arbitrary power vested in the court, by making it their duty to appoint the surveyors of the township, unless the road would run through their lands. In the case of *The State v. Atkinson*, 3 *Dutcher* 420, the judge, in delivering his opinion, said, that the act of March, 1850, giving compensation to land owners, made the surveyors of the township interested as taxpayers, and although that act did not expressly repeal so much of the then existing road act as required that regard should be had to the appointment of the surveyors of the township, yet that it rendered the requirement nugatory.

For the purpose of testing the accuracy of this view taken

Parsell v. State, Mann et al., pros.

by the late learned justice, let us suppose that the act of 1850 had been passed in 1812, as a supplement to the act of 1811, would it have virtually repealed the requirement respecting the surveyors of the township, or render it nugatory? Clearly it would not. The two enactments would not have been inconsistent with each other; and under the act of 1811, the courts would have been bound to appoint surveyors as judges whom the legislature had declared, in unequivocal words, should be appointed, unless they came within the one proviso of being land owners on the route. So far as the decision in the case of *Atkinson* conflicts with rulings of the Supreme Court, made before 1818, establishing the *necessity* of the appointment of the surveyors of the township, unless they come within the exception in the statute, we consider it is not sound law.

The next general "act concerning roads" was passed 9th of February, 1818, and is found in *Pennington's Revision of the Laws*, page 615. It contains an addition to the proviso of the 2d section. In it, the proviso reads, "that no surveyor shall be appointed through whose lands the road may run, or who, for any other reason which the court in their discretion shall deem sufficient, think ought not to be appointed." That act was re-enacted in the revision in 1846, and was the law of the state when the supplement of 1850 was passed, which provides for compensation to the owners for lands taken for the purposes of public roads. This court, *una voce*, declare the true construction of the 2d section of the act to be, that the Court of Common Pleas and the Supreme Court are bound, as a legal necessity, to appoint the surveyors of the township through which the road is to run, unless it is to run through their lands, or who for some other reason which the court, in the exercise of a sound legal discretion, think should not be appointed; and further, that the simple fact of the surveyors being taxpayers in the township, is not sufficient to exclude them or to warrant the courts in refusing to appoint them, and that the supplement of 1850 furnishes no ground, *of itself*, to which the discretion of the

Parsell v. State, Mann et al., pros.

courts can be properly applied. It may be an element, among other reasons, which, taken together, the court may deem sufficient to exclude the surveyors from appointment.

This brings us to the consideration of the question of *fact*, upon which the Supreme Court rested their judgment in setting aside the proceedings had below, which fact was stated by them to have been clearly proved; and the examination of it raises the second point, which I have made, *viz.* whether it properly appeared before the Supreme Court, that the Court of Common Pleas disregarded the requirement of the 2d section of the road act in making the appointment of surveyors? The justice said, that the Court of Common Pleas rejected the surveyors of the township through which the road was run, simply because they were residents of that township, and taxpayers therein; and that such rejection was not the result of an exercise of discretion, but was the adoption of an inflexible rule, to be applied to all cases. No such reason for the decision of the Common Pleas appears upon their order returned with the *certiorari*. It is distinctly and clearly stated therein, that regard *was* had to the appointment of the surveyors of the said township where the said road applied for was to be laid, whom the court, for sufficient cause, refused to appoint. It is manifest, upon the face of the order, that the Pleas felt the obligation of the requirement of the section, and that, in the exercise of the discretion which was vested in them, they adjudged that the caused urged against those surveyors was sufficient to require their rejection.

The justice of the Supreme Court states, in his opinion, that the reason for the exclusion was not denied or controverted in any way, and was clearly proved.

It is sufficient to say, that on a writ of error, which brings up the record from the Supreme Court, we cannot look to admissions made on the arguments below, but must be governed by what appears with the return. If the parties meant to present the case upon facts which neither side disputed, they should have made out in writing, in the court

Parsell v. State, Mann et al., pros.

below, a state of their case, and have signed and filed the same, so that it would have come into this court with the record. It would be dangerous for a court of error to base their judgment in the last resort, upon any matter not apparent upon the record and files of the court below, but resting only *in pais*.

The proof upon the point is found in the testimony of Leonard Bunn, esq., who was one of the judges of the Court of Common Pleas. This deposition was taken more than eighteen months after the order of appointment was made. The case branches again at this point. Should the Supreme Court review the discretion which the Common Pleas declare, in their order, that they exercised? If not, the case must end here; if they ought to exercise that power, was the fact of the cause of the exclusion of the surveyors of Bridgewater properly before that court?

It is a well recognized rule in practice, that a court of review will not examine into a matter confided to the discretion of an inferior tribunal, which has exercised its discretion upon it.

In *Wright v. Green*, 6 *Halst.* 334, the justice said, the law confides "the exclusive order and directions in such cases (referring to discharging bail, &c.,) to the legal discretion and judgment of the court having jurisdiction over the subject matter; and courts of error will not deem themselves at liberty to review the same." Upon another branch of the same case he says: "So much of discretion is involved in the opening or setting aside a judgment that, as in other analogous cases *where those circumstances*, which properly govern and guide the determination of the court, are scarcely susceptible of being fully and entirely exhibited on paper, so as to become a subject of review, the law has wisely resolved, there is less of evil in leaving uncorrected, errors which occasionally occur, than in attempting to correct them." In *Gilleland v. Rappleyea*, 3 *Green* 145, the Chief Justice said: that the court, upon a writ of error, will not draw into discussion such orders as have been made upon application to the mere discretion of the court below. In the case of *The*

Parsell v. State, Mann et al., pros.

State v. Vanbuskirk and others, 1 Zab. 87, one reason relied on for setting aside the return was, that the surveyor of the township had not been appointed. The Chief Justice said: the law imposes no other restriction upon the discretion of the court than is contained in the clause cited. The order of the court explicitly states that the appointment was made, regard having been had to the appointment of the surveyors of the townships where the new road is applied for to be laid out; "the requirement of the statute is in every respect fully satisfied."

In 1 Zab. 344, *The State v. Bergen and others*, Justice Whitehead said, it was sufficient for the court, in their appointment of surveyors, to certify that regard was had, &c., and that the reasons why the surveyors of the township where the road is applied for were passed by, need not be particularly assigned. In 1 Dutcher 233, *The State v. Vanderveer*, the objection made to the road was, that one of the surveyors was disqualified to act on account of expressing an opinion. The Supreme Court said, the only positive disqualification in the act was being a landholder on the line of the road. Every other unfitness is referred to the discretion of the court making the appointment. If the objection was made at the time of the appointment, the court exercised its discretion, and we have no right to interfere.

On a review of the last case in this court, the judgment of the Supreme Court was unanimously affirmed. A remark, made by the judge who read the opinion, "that if the Common Pleas, in the appointment of surveyors, should in their discretion act capriciously, in violation of settled principles of law and equity, the superintending tribunal has power to review and correct their proceedings," does not aid the plaintiffs in error; because the order of the Pleas in this case is not alleged to be against well settled principles, but in contravention of a requirement of the statute, upon which they had a right, by the same statute, to adjudicate, and to appoint or to reject in their discretion. The remarks were followed with these sentences: "Our road act contemplates the exer-

Parsell v. State, Mann et al., pros.

cise of a sound judicial discretion, which should be guided by the nature of the circumstances and the acknowledged rules of proceeding in such cases."

Who can say, from an examination of the order of appointment, which forms a part of the present record, that the Common Pleas of Somerset did not exercise their discretion precisely in the manner directed by this court? Who can put his finger upon the slightest indication of capriciousness? If it legally appears to the Supreme Court, in a case before them, that the judges of the Court of Common Pleas refused to exercise the discretion required by the statute, they will review and set aside their action. In the present case, I am decidedly of opinion that the court should not have gone behind the language of the order of appointment, and inquired for reasons, and applied their own discretion for reforming the discretion of the Common Pleas.

The 3d section of the road act provides, that when a road is required to be laid out, altered, or vacated on any part of the line between two counties, or a part in one county, and a part in another, application for the appointment of surveyors shall be made to the Supreme Court, who shall appoint three surveyors in each of the counties, having a regard to the appointment of the surveyors of those townships where the road is to be laid, subject to the restrictions imposed in the 2d section. Suppose that parties interested in such an application, should be dissatisfied with a conclusion to which that court should come, in the exercise of the same discretion which is confided to the Common Pleas, how could that discretion be reviewed? A writ of error would not lie to the order. No *certiorari* issues out of this court, except to bring up out-branches of the record on allegation of diminution. If an exercise of discretion by the Supreme Court cannot be considered in a superior tribunal, is it expedient for them to stretch their superintending power for the purpose of examining into an exercise of the discretion of the Common Pleas upon a like subject matter? I think that more mischief would flow from such a practice, than can result from

Parsell v. State, Mann et al., pros.

affirming the orders and proceeding had in the Common Pleas. The proper construction of the act will be given by this court, and if the road in question is unnecessary and injurious, an application can be made for the appointment of surveyors to vacate it. As yet the township has not been subjected to expense. If the decision of the Supreme Court should be affirmed, its effect might reach to and disturb many roads laid out since the act of 1850, upon which expenditures have been made, and much work been done.

But if the Supreme Court did right in going behind the order of appointment, was the fact upon which they acted made manifest to them according to the settled rules and practice of that court? And did the fact, which they obtained through the affidavit of Judge Bunn, show conclusively the want of an exercise of discretion and the adoption of an inflexible rule? Who will judicially declare that it was not discreet in the Common Pleas, under the circumstances, if they saw fit so to do, to follow what they understood to be the proper mode of proceeding, as adopted by the Supreme Court, rather than to have opposed it by their private judgments, and thereby, perhaps, have subjected their order to review for contumacy? In road matters, the Common Pleas do not act according to the course of the common law, but in pursuance of a statute which marks out the line of their proceedings. They act upon the same species of authority as they do, in taking cognizance of appeals from the courts for the trial of small causes. The rule which the Supreme Court has established, by long and uniform practice, for obtaining information from the inferior tribunals respecting their proceeding upon the trial of an appeal, should prevail with equal propriety in matters of roads.

That rule was stated by Justice Potts, in *Moore v. Hamilton*, 4 Zab. 532. Premising that, on the trial of appeals, the Common Pleas act upon a special statutory jurisdiction, he says, that the proper course to get the facts before the court above on *certiorari*, is to take a rule upon the court below to certify what the facts were in the first instance, and

Parsell v. State, Mann et al., pros.

then, if the court fail to certify, resort may be had to a rule for affidavits. He cites *Scott v. Beatty*, 3 Zab. 259. A reference to that case shows the rule in more specific language. There was a *certiorari* from the Circuit Court to the Common Pleas, and another from the Supreme to the Circuit Court. The Chief Justice, among other things, said, in his opinion, "that the facts before the Common Pleas on the appeal was a matter to be shown before the Circuit Court. No state of the case is agreed on or settled by the court below; no rule was taken upon that court to certify what the facts were; but the plaintiff, in the first instance, resorts to affidavits to prove what evidence was offered on the trial of the appeal." This, he adds, is a violation not only of the long settled practice of the court, but of the most *obvious dictates of reason and propriety*. If no state of the case be agreed on, the proper practice is, in the first instance, to call upon the court to return what the facts were. Their return is conclusive. If the court below fail to make a return of the facts, then, from the necessity of the case, *and then only*, can resort be had to affidavits." The fact, that the testimony taken in this case was taken under a rule of the Supreme Court, does not aid the defendants' case. Such rules are frequently entered in the minutes, without specially directing the attention of the court to the matter. This rule is general, and doubtless was entered without notice to the other party. It simply orders "that the parties have leave to take affidavits to be used on the argument," on motion of the attorney for the plaintiff, in Supreme Court. In the case last cited, 3 Zab. 259, the court further said: "a rule to take affidavits authorizes the taking only of legal and competent evidence," and the rule should specify the purposes for which the affidavits are to be taken. This rule, therefore, was improvidently entered, because it is without specifications, and was entered before any rule was taken upon the Common Pleas to certify the reason why they rejected the surveyors of the township of Bridgewater.

If the rule or practice on this subject, which has been

Parsell v. State, Mann et al., pros.

pursued by the Supreme Court, shall now be approved and established by this court, the subject will be set at rest, and an uniformity of proceedings hereafter be secured which is "consonant with reason and propriety." It is unnecessary to consume time in relation to the sufficiency of the affidavits.

The Court of Common Pleas is composed of three county judges and a justice of the Supreme Court, all of whom are presumed to be present when the court is open for business, unless the contrary appears. No reference is made in the testimony to either of the other judges; but one was relied upon as sufficient to express the facts and considerations which moved his brethren in deciding a question of pure legal discretion. I am clearly of opinion that the fact was not made manifest to the Supreme Court in a proper legal form; and also, that the deposition of Judge Bunn, standing alone, is insufficient to contradict the language used by the whole court, on the face of the order of appointment.

The second complaint made in the Supreme Court, referred to the assessment of damages to the land owners. The return does not show that assessments were made to any persons who were applicants in the petition presented to the Court of Common Pleas. That was the only guide which the surveyors could have, and they do not appear to have disregarded it.

The fourth reason relied on in the Supreme Court was, that the surveyors acted on an erroneous principle in laying out the road; because it is said, that if the Central Railroad Company had done their duty in making proper crossings where the track intersects the common road, the road in question could not have been required. The railroad was constructed over twenty years ago, when the danger and inconvenience complained of was created. Having borne the same for that length of time, the inhabitants of the county asked to be relieved from it by a cross-road. The question for the surveyors to settle was, whether, when this road was applied for, it was necessary. They went upon the ground,

Graham v. Houghtalin.

and adjudicated that it was necessary. The cause of the necessity they had nothing to do with. The proposition made by the counsel for the defendants in error is a broad and far-reaching one, and perhaps ought to be examined; but I do not think the present occasion is the time for doing it. The duty which it urges, rests upon every railroad in the state of any magnitude, and a requirement which enters into the legality of their crossings of highways is too important to be collaterally settled, upon an application for a local neighborhood road, in which the railroad company is not a party. The judgment of the Supreme Court should be reversed.

For reversal—Judges COMBS, CORNELISON, ELMER, FORT, GREEN, OGDEN, VREDENBURGH, WALES, WOOD. 9.

For affirmance—None.

CITED in *State, Winans, pros., v. Crane, 7 Vroom* 401.

ARCHIBALD GRAHAM v. JANE HOUGHTALIN ET AL.

1. A deed was made, on the 31st August, 1810, by G. G. to D. and E. his wife, conveying to the said D. and wife the premises in question for and during their natural lives, and the life of the survivor of them, and after their decease, to the children of the said D. by his said wife, and to their heirs and assigns for ever.
2. *Held*, that the remainder vested in the children living at the date of the deed, subject to open to let in after-born children.
3. On the 15th of June, 1818, the said D. and his wife were still living, and had then six minor children, and afterwards had two more born. On the said 15th June, D., as the guardian by nature of his children, obtained a decree of the Orphans Court of Essex to sell the said lands for the support of said minors.
4. In an action of ejectment, brought by the children against the purchaser, after the death of D. and wife, *held* that the two children born after the sale were not affected by it.
5. *Held further*, that the other children, being minors, and not orphans, at the time of the decree for sale by the Orphans Court, were not bound by the decree; that the Orphans Court had no jurisdiction over

Graham v. Houghtalin.

the subject matter, and that a sale under the decree was void, and conveyed no title.

6. By the term guardian, in the 6th section of the act of 1799, *Rev. Laws*, is meant such guardians as are named in the previous sections of the act.
7. A minor who is seized of a remainder in fee expectant upon the death of his father, who has a life estate therein, cannot be a ward in socage, nor can his father be his guardian in socage.
8. The father, who is guardian by nature only, and not appointed by any court or competent authority, is not a guardian within the meaning of the phrase "other guardian," named in the 3d section of the said act of 1799 respecting guardians.
9. A father, as guardian by nature, is not appointed ; it results to him by operation of law.
10. A guardian by nature is guardian of the person only, and not of the estate.

Error to Supreme Court.

This was an action of ejectment, brought by the defendants in error against the plaintiff, in error, in the Supreme Court, to recover possession of a parcel of land, containing 9.83 acres, in the city of Paterson. The suit was commenced on the 30th November, 1861. The defendant pleaded the general issue, and the cause was tried in April, 1862, at the Circuit Court in the county of Passaic, before his Honor Justice Ogden.

The plaintiff offered in evidence—

1. A deed, from Richard Van Gieson and Jane his wife, dated 31st August, 1810, to Henry Doremus and Elizabeth Doremus his wife, (the said Elizabeth being a daughter of the said grantors) by which the said grantors, for and in consideration of the love they have and bear for and unto their daughter Elizabeth, wife of the said Henry G. Doremus, and for the consideration of one dollar, granted and sold to the said Henry and Elizabeth Doremus, for and during the term of their natural life and the life of the survivor of them, and after their decease to the children of the said Henry G. Doremus by his said wife Elizabeth, and to their heirs and assigns for ever, certain parcels of land, including the premises in

Graham v. Houghtalin.

question. The *habendum* clause in the deed corresponded with the term of the grant. This deed was duly acknowledged and recorded.

The plaintiff then proved—

That Henry G. Doremus died in 1837, and Elizabeth Doremus died in 1861, and that all the plaintiffs, except James Fox, were children of the said Henry and Elizabeth, five of them having been born after the execution of said deed, and that the defendant was in possession of the premises.

The defendant offered in evidence—

1. An order of the Orphans Court of Essex county, made June, 1818, authorizing Henry G. Doremus, as guardian of the persons and estates of Jane, Henry, Josiah, Eliza, George, and Richard Doremus, his children, minors under the age of twenty-one years, to sell all the real estate of the said infants, for and towards their maintenance and education, they having no personal estate, and the rents and profits of the said real estate being insufficient to maintain them.

2. A certified copy of a report of sale, made by the guardian to Abraham Ryerson, of the lot in question, on the 8th November, 1819, for five hundred dollars.

3. A deed from said Henry G. Doremus to said Ryerson for said premises, dated December 6th, 1819, which deed sets out the order of the Orphans Court, and the sale made in pursuance of it, and was afterwards acknowledged and recorded.

4. A deed from Abraham Ryerson to Henry G. Doremus, for the same premises in fee, for the consideration of five hundred dollars, dated December 6th, 1819, and recorded on the 7th of December.

5. A certified record of a decree of the Court of Chancery, on a foreclosure suit upon a mortgage given by said Henry G. Doremus to Aaron A. Van Houten, for the sum of eight hundred and fifty dollars, dated November 17th, 1819, in which suit the said Aaron A. Van Houten was complainant, and Henry G. Doremus and wife defendants, and which

Graham v. Houghtalin.

decree bears date January 7th, 1821, and is for the sum of \$919.42, and also a copy of the execution issued on said decree.

6. A deed from Joseph T. Baldwin, sheriff of the county of Essex, dated July 20th, 1821, to Daniel Holsman for the said premises, consideration \$1035.33.

The defendant then proved that he had been in possession of the premises, as tenant under Daniel Holsman and his heirs, since 1832; that Holsman, when he bought, supposed he was buying a good title; that it was publicly known that Henry G. Doremus, in addition to his life estate, had got the title of the heirs by proceedings in the Orphans Court; that at the time of the sale by the guardian, \$500 would have been considered a fair price for the remainder expectant on the death of Henry G. Doremus and his wife; that the regularity or *bona fides* of the sale was not called in question until many years after it was made, and that the said Doremus was poor and improvident.

The plaintiffs then further offered in evidence—

1. An account of Henry G. Doremus, guardian of Henry, Josiah, Eliza, George, Richard, and Jane Doremus, for maintenance and education, exhibited to the Orphans Court of Essex county, June 15th, 1818, amounting to \$1764.

2. A bond purporting to be a guardianship bond given by Henry G. Doremus and Helmagh R. Van Houten to the Ordinary of the state, in the penal sum of \$1250, dated June 15th, 1818, and with a condition as follows: "The condition of the above obligation is such, that if the above bound Henry G. Doremus, as father and natural guardian of Jane, Henry, Josiah, Eliza, George, and Richard, his children, shall take due and proper care of whatever property, whether real or personal, of his said children, which hath or may come to his hands, and make no waste thereof or destruction therein, and render to them, when of full age, a just and true account thereof, and pay over whatever may be in his hands, then this obligation to be void."

3. A certificate of the surrogate of Essex, dated 1862, to the effect that he had searched, from 1810 to the present

Graham v. Houghtalin.

time, and could find no other paper in his office in relation to the guardianship of children of Henry G. Doremus, nor any order for the appointment of a guardian.

The plaintiffs also called witnesses to show that the children of said Doremus, when minors, worked in the mills at Paterson for wages, and earned money—some two or three dollars a week,—this was between 1815 and 1822.

The evidence having been closed, the plaintiff's counsel contended—that the deed given by Henry G. Doremus to Abraham Ryerson was a nullity, because it did not appear he was guardian of his children, and no order of sale could be made by the Orphans Court in such case; that according to the evidence, the deed from Doremus to Ryerson, and the deed from Ryerson back again to Doremus, were fraudulent and void.

The defendants' counsel contended, and called upon the court to charge, that the decree of the Orphans Court was evidence of the facts recited therein, except the fact of Henry G. Doremus being guardian of his children. They also asked the judge to charge that none of the children born after the execution of the original deed from Van Gieson and wife to Henry G. Doremus and Elizabeth his wife were interested in the remainder created by said deed. They also called on the judge to charge that the sale by the guardian could not be attacked for fraud in a trial at law, but only in a court of equity; but if he should refuse so to charge, then they asked him to charge, that there was no evidence before the jury from which they could infer fraud in said sale; and at all events, as there was no evidence to charge Daniel Holsman with any knowledge of fraud in the guardian's sale, he was not affected by it, if any had been committed.

The judge charged the jury, for the purposes of the trial, that the Orphans Court had jurisdiction to make the order of sale, and that said order could not be attacked in this collateral way.

He further charged, that the question of fraud in the sale by Doremus, as guardian, might be inquired of in a trial at

Graham v. Houghtalin.

law for the purpose of avoiding such sale, and that there was evidence from which, if it would sustain them, the jury might infer that the sale by Doremus, as guardian, to Ryersan, was a legal fraud upon the children, and therefore void as to them; and that Holsman stood in no better situation than Doremus did, but was bound to inquire and ascertain the facts before he purchased. And on the question of fraud, the judge charged the jury, that they had a right to look at the fact, that the deeds from Doremus and Ryerson were of the same date; and that they had a right to look at the guardian's account, as filed in the Orphans Court, and at Doremus' poverty, as an inducement for fraudulent conduct. The judge also charged, that all the children of Henry G. Doremus and Elizabeth his wife were interested in the remainder created by the deed.

To the matters so charged, and each of them, except as to the jurisdiction of the Orphans Court, the defendants' counsel excepted, and prayed a bill of exceptions, which was allowed and sealed accordingly.

Upon the coming in of the *postea*, judgment for the plaintiffs was entered upon the verdict found by the jury, and thereupon the defendant brought his writ of error into this court, and assigned for error, that the charge of the judge was erroneous in the several matters excepted to as above stated.

For plaintiff in error, *J. Hopper* and *J. P. Bradley*.

For defendant, *D. Barkalow* and *A. S. Pennington*.

VREDENBURGH, J. This is an ejectment, brought by Doremus and others, to recover a lot of 9.83 acres, in the city of Paterson. The plaintiffs claim title, under a deed dated the 31st of August, 1810, from Richard Van Gieson to Henry G. Doremus and Elizabeth his wife, whereby the grantor conveyed to the said Doremus and wife the premises in question for and during the term of their natural life, and the

Graham v. Houghtalin.

life of the survivor of them, and after their decease to the children of the said Doremus by his said wife, and to their heirs and assigns for ever.

The plaintiffs are the children of the said Doremus and wife. Mrs. Doremus survived her husband, and died in 1861. This gives a perfect *prima facie* title to the plaintiffs. Although only two of the plaintiffs were born at the date of this deed, yet it is manifest that the deed vested the remainder in the children then born, subject to be opened at the birth of each succeeding child, so as to let them in equally as they were born. The plaintiffs therefore, by virtue of the remainder vested in them by this deed, were entitled, at the death of their mother, in 1861, to recover the possession, unless the defendant shows a better title.

The defendant sets up, as such better title, a decree of the Orphans Court of the county of Essex, dated on the fifteenth day of June, 1818, ordering Henry G. Doremus, the father of the plaintiffs, to sell this land for the support of such of the plaintiffs as were then born; also the proceedings on said decree, and a sale and deed under it, to the defendant's grantors. The question is, whether these proceedings in the Orphans Court, and the sale and deed under them, transferred the title of the plaintiffs to the defendant. As to the title of Rachel Ann Fox and John Doremus, two of the plaintiffs, who were born after this order of the Orphans Court, it is clear that their title did not pass, because the title of the children who were born before the decree of the Orphans Court was subject to be divested to the extent that there might be afterborn children, and was actually divested by the birth of these two children, and became vested, to that extent in them. The estate of such afterborn children was not, and could not therefore have been affected by the proceedings in the Orphans Court, consequently the said Rachel Ann Fox and John Doremus, to the extent of one-eighth each, are entitled to recover, even if the proceedings and sale under the Orphans Court are valid.

The next question is, whether the other six-eighths passed

Graham v. Houghtalin.

by the proceedings in the Orphans Court. The first question raised by the plaintiffs in regard to these is, whether the Orphans Court had jurisdiction of the subject matter. This decree of the Orphans Court is dated on the 15th of June, 1818, and recites, that whereas Henry G. Doremus, guardian of the person and estate of Jane, Henry, Sophia, Eliza, George, and Richard Doremus, minors, under the age of twenty-one, hath satisfactorily shown to the court that the said minors have no personal estate, and that the rents, &c., of the real estate are not sufficient for their maintenance and education, and do therefore, agreeably to the act of the legislature in such case made and provided, further adjudge and decree that the said guardian sell all the real estate of said infants.

On the 7th December, 1819, the guardian reported that, in pursuance of said order, he had sold the premises in question, for \$500, to Abraham Ryerson, under whom the defendant held. Had the Orphans Court of the county of Essex, on the 15th day of June, 1818, any power to order this sale? Had they jurisdiction over the subject matter? The subject matter is the sale of the real estate, not of orphans, but of the minor children of Henry G. Doremus. The authority under which it is contended that the Orphans Court had power to sell these lands, in the sixth section of the act, passed on the first day of February, 1799, *Pat. Laws* 347, which was the act in force when these proceedings in the Orphans Court were had. This section reads as follows: "That if the personal estate, and rents and profits of the real estate, be not sufficient for the maintenance and education of the ward, the Orphans Court of the proper county, on full investigation thereof, may from time to time order the guardian to sell such parts of the ward's lands, tenements, hereditaments, and real estate as they shall direct and judge adequate for his or her maintenance and education." So that it will be perceived that the act did not give power to the Orphans Court to sell the lands of everybody, but only the lands of wards by guardians. Were the plain-

Graham v. Houghtalin.

tiffs, when these proceedings were had, wards within the meaning of this act? If they were not, the Orphans Court had no jurisdiction whatever of the subject matter.

The act is entitled "an act relative to guardians."

It has never been supposed, by anybody, that this act was intended to embrace all kinds of guardians or all kinds of wards; that it embraced guardians *ad litem*, guardians for nurture, or guardians for lunatics or idiots; nor were the lands of such wards ever attempted to be sold under it. When guardians and wards were spoken of in common parlance, the parties meant guardians appointed by the Ordinary and Orphans Court as his wards. However obtained, the Ordinary, long before this act was passed, had exercised the power of appointing guardians of orphans, but his power was confined to that; he never pretended to interfere with the property or custody of infants who were not orphans. The ecclesiastical courts of England never attempted to interfere with infants who were not orphans, either as to their persons or estates; and if they had, they would very soon have found themselves brought up in the Court of Chancery. But in this state, the Ordinary always exercised jurisdiction over orphans, so far as to appoint guardians over their persons and estates, and to call such guardians to account and settlement.

At the time of the passage of this act in 1799, the Ordinary, in analogy to the ecclesiastical courts of England, had jurisdiction over the probate of wills, granting letters of administration and the settlement of accounts and orders of distribution, and the power, however obtained, as we have before stated, over the persons and estates of orphans. These were cognate subjects, relating to the estates of deceased persons; but the estate of a minor who was not an orphan was a subject altogether foreign to the jurisdiction of the ecclesiastical courts of England, as well as to the jurisdiction of the Ordinary here. As to the minor who was not an orphan, his rights were always, in England as well as in this state, under the supervision of chancery alone. This

Graham v. Houghtalin.

being the condition of the law in this regard, at and for a long time before this statute relating to guardians was passed in 1799, let us see what legislation had been had affecting this subject. The first legislation in this state affecting this matter was the act of 1784. At this time it was inconvenient and unsatisfactory for the people to be obliged to settle their accounts, as executors, administrators, and guardians, in the Prerogative Court; and this act of 1784 was passed, not to include in its operations, matters of jurisdiction not before vested in the Ordinary, but to divide his jurisdiction between him and the Orphans Court, in order to afford greater facilities of doing it. The first mention of an Orphans Court in this state is the said act of the 16th December, 1784. *Pat. Laws* 135. The act is entitled "an act to ascertain the power and authority of the Ordinary and his surrogates, to regulate the jurisdiction of the Prerogative Court, and to establish an Orphans Court in the several counties of this state." The preamble reads as follows: "Whereas, it is necessary that the power and authority of the Ordinary and his surrogates should be defined, the jurisdiction of the Prerogative Court regulated, and an Orphans Court established in the several counties of this state—therefore be it enacted, that from and after the passing of this act, the authority of the Ordinary shall extend *only* to the granting of probates of wills, letters of administration, letters of guardianship, and marriage licenses, and to the hearing and finally determining all disputes that may arise thereon." It then prescribes the time of holding the Prerogative Court. The act then enacts, that there shall be an Orphans Court in each county, which shall hear all disputes respecting the existence of wills, the fairness of inventories, the right of administration, and the allowance of accounts of executors, administrators, guardians, and trustees, audited and stated by the surrogate, and such other powers as are given by the act. It is apparent, from this act, that by it, the legislature did not intend to give to the Ordinary or the Orphans Court jurisdiction over classes of individuals over

Graham v. Houghtalin.

which the Ordinary had not jurisdiction before, but to divide that power between the Ordinary and the Orphans Court. It limited the power of the Ordinary over certain matters, which it had previously, and gave it to the Orphans Court, with right of appeal. But the two courts, together, had jurisdiction over the same classes of individuals after the act, that the Ordinary had before. The name and idea of the Orphans Court were borrowed not from the English ecclesiastical courts, but from a court called the Court of Orphans, for a long time established in London and some of the other large cities of England, and which, as its name imports, had jurisdiction over the estates and persons of orphans only. So far as regarded decedents' estates, generally, the act gave the Orphans Court the same jurisdiction as the Prerogative Court, borrowed from the English ecclesiastical courts, had over executors and administrators; and so far as orphans were concerned, it gave the Orphans Court the same jurisdiction the Ordinary had, and which, so far as the Orphans Court was concerned, was borrowed from the Court of Orphans of the city of London; but so far as minors who were not orphans were concerned, neither the Prerogative Court or Ordinary in this state, or the ecclesiastical courts of England, or the Orphans Court of the city of London, had power to meddle with their persons or estates. Minors who were not orphans, were always foreign to the power and jurisdiction of all these courts. It is apparent, upon every line of this statute, that when it speaks of guardians and wards, it means only guardians of orphans; and when it speaks of wards, it means orphans only. So palpable is this, that we find the words minors and orphans used as synonymous throughout the act.

The 18th section of the act of 1784 provides how the letters of guardianship shall be obtained and issued by the Ordinary, but it provides for orphans only; showing that the legislature did not understand that the Ordinary or the Orphans Court had any power over minors who were not orphans. The 11th and 12th sections of the act of 1784 authorized the court to sell the lands of orphans, only for sup-

Graham v. Houghtalin.

port and maintenance. Such was the condition of the law when this act we are considering, of 1799, was passed. Did this act of 1799 intend to extend the power of the Orphans Court over classes of individuals not before within the jurisdiction of either the Ordinary or the Orphans Court, further than it is expressly named therein? It is entitled "an act relative to guardians." If nothing had been said in the act with respect to what guardians were meant, we should infer that it had regard only to such guardians as were referred to in the act of 1784, *viz.* those of orphans and those appointed by the Ordinary or the Orphans Court.

Let us now examine the language of this act itself. It was passed in 1799. These proceedings for sale were had under it in 1818. To appreciate the language of the act accurately, we must carry ourselves back to 1799, live among and breathe, as it were, the air and customs of that age. The defendant contends that the father is a guardian, and his children such wards as is meant in the 6th section of the act of 1799. The language of this 6th section, as we have seen, is—if the rents of the estate be not sufficient for the maintenance of the wards, the court may order the guardian to sell it. The section does not say what kind of ward or guardian is meant; but the presumption is, that this section means such individuals as were the wards of such guardians as had been previously named in the act. We must therefore, from necessity, resort to the previous provisions of the act to ascertain what kind of guardians and wards are meant. The first section provides that every guardian appointed by will shall appear before the Orphans Court, and give bond. But such kind of a ward must necessarily be an orphan, for no one can create a testamentary guardian but the father, and he must be dead before his will appointing a guardian can go into effect. So far, therefore, as the first section of the act is concerned, it clearly authorizes the sale of lands of orphan wards only. Let us now examine the second section of the act. This provides that every court, or other competent authority appointing a guar-

Graham v. Houghtalin.

dian shall take bond. But the father was never appointed by any court or other competent authority, within the meaning of this section. The competent authority, under which the father acted as the guardian of his minor children, was the broad seal of God and nature, and it is not to be presumed that this is the kind of competent authority spoken of in this section. The court or other competent authority spoken of in this section is, obviously, the Chancellor, the Orphans Court, and the Ordinary, or his surrogates. The legislature use this peculiar language, "court or competent authority," for two reasons—1st, because, upon the face of the act of 1784, then in force, it was doubtful, in some cases, whether the appointment was made by the Orphans Court or the Ordinary ; and 2d, because it was doubtful if the Ordinary and his surrogates might be deemed a court. But the father was never appointed guardian by any court or any authority whatever, and could not have been until the passage of our act, for the first time in 1843. Until then, the jurisdiction of all courts to appoint, even of the Lord High Chancellor himself, arose only upon the death of the father, and in the case of orphans.

Let us now proceed to examine the 3d section of this act, and see if that refers to any other guardians, except those of orphans. It provides that every testamentary guardian, guardian in socage, or other guardian, shall, within three months after his acceptance of appointment to his office, deliver an inventory and account in the Orphans Court. Now, in the first place, in the absence of all language showing a contrary intent, the presumption is that this mandate has reference only to the kind of guardians referred to in the first two sections—to only those required by them to give bond. It is the obvious intent of the act to require the Orphans Court to take bond from all kinds of guardians, over which it intended to give the Orphans Court jurisdiction. This is manifest, further, by the special language of the section. It says, every guardian, within three months after his acceptance or appointment to his office, shall account, &c. So that the section only speaks of guardians who accept of

Graham v. Houghtalin.

or are appointed to the office. Now this is true of the guardians spoken of in the first two sections; the testamentary guardian is appointed by will, and is not guardian until he accepts. The guardian in socage accepts, if he sees fit. All other guardians named in the first two sections are appointed by the courts. But the father neither accepts or is appointed as guardian of his minor children. Their guardianship is thrown upon him by the mere operation of law, and he is not at liberty to refuse it; and therefore this kind of guardianship is matter neither of acceptance or appointment. The section speaks of guardians, only, who accept or are appointed. This is true of all kinds of guardianship except that of the father to his minor children, or of guardian for nurture, but is not, and cannot be true of them.

But let us consider the terms of this section more specifically. The first kind of guardian named in it, is the testamentary guardian. These, we have shown, must necessarily have been guardians of orphans only. The next kind of guardians named are guardians in socage. Was the father guardian in socage? were his children wards in socage? These plaintiffs were not tenants in any sense of the word socage or otherwise. They had an estate in remainder. The tenants in socage, if any there were, were the father and mother, not the children. There could, from the nature of things, be no guardian in socage while the land was held by the tenant for life. Guardianship in socage results by reason of the orphans being tenants in socage. These children were not tenants; they did not hold the land, while the father and mother held it by virtue of their life estates. In all tenures in socage those who are bound to pay the rent or render the service are and can be the only tenants in socage. One not bound to pay the rent, or render the stated services, could not, from the nature of things, be tenant in socage. The guardian in socage is one who takes possession of land for the benefit of the minor. Where there is no land which the guardian can take possession of for the benefit of the minor, there can be, from the nature of things, no guardian

Graham v. Houghtalin.

in socage. The orphan remainderman can be no tenant in socage, nor can any guardianship in socage result therefrom. The guardianship in socage results, by operation of law, out of an existing tenancy in socage, and when the present profits flow not to the father, but to the orphan. When the present profits flow to the father, he is bound to pay the services, and therefore he is the tenant in socage, and not the child.

The only remaining phrase in this act, that could by possibility have reference to the case before the court, is the phrase in the 3d section, "other guardian." This section says, "testamentary guardian, guardian in socage, or other guardian."

The defendant contends that the father of these plaintiffs was guardian by nature, and therefore within the meaning of the phrase "other guardian." Mr. Doremus, the father of these plaintiffs, was not, as we have seen, either the testamentary guardian or the guardian in socage of the plaintiffs. He was not a guardian appointed by any court or competent authority. He was not appointed by the Ordinary, or the Orphans Court, or by the Chancellor.

This is manifest from two considerations: first, because in his bond filed with the Ordinary, he calls himself the natural guardian, which excludes the idea of appointment; second, because neither the Ordinary, the Orphans Court, or the Chancellor himself, has any power to appoint him. He took as guardian by nature, not by appointment of any tribunal at all, but it resulted to him by operation of the law of nature. The father is always, upon the birth of every child, whether he has property or not, guardian by nature. But the question here is, is a guardian by nature such a guardian as is meant by the phrase "other guardian," in the 3d section of this act of 1799.

Now it is apparent, from all the sections of this act, that it had no reference to any such guardian, any more than to guardian for nurture, guardian *ad litem*, guardians of idiots or lunatics, or guardians of the public peace.

In the first place, guardian by nature is guardian of the

Graham v. Houghtalin.

person only of his child, and not of his estate. When a child, in the lifetime of its father, becomes vested with personal property, no one is strictly entitled to take it as a guardian, until a guardian has been duly appointed by some public authority. 2 *Kent* 244; 1 *P. Wms.* 285.* Now all the sections, and every line of this act of 1799, have reference only to guardians who have the custody of the property of their wards. The father can neither be appointed by the Ordinary or Orphans Court, or give bond. Can we suppose that the legislature should take bond from a guardian who has no custody of, and is not responsible for the property? The guardian for nurture or by nature might as well give bond for all the property of the ward.

In the next place, the guardians spoken of in the act are required to file an inventory under oath. Now this applies to guardians by appointment, but how is it possible for the guardian who has nothing to do with the property to do it? The guardian named by the statute is to account every year, or oftener, for what comes to his hands. How is the guardian by nature to do this when nothing comes at all? Again, section 4th provides that any guardian who shall not deliver an inventory or render an account, shall be made to perform his duty or be displaced. How is a guardian who has nothing to do with the property to do this? or how is the Ordinary or Orphans Court to displace the father as guardian by nature.

The Chancellor of England has refused to displace the father when, as guardian in socage, he had the custody of the ward's socage lands, and said that he would protect the ward by appointing some one to act in the name of the father, but he would not take the child from the custody of the parent or deprive him of his guardianship by nature.

Again, in the 5th section, it is provided, that the Orphans Court, when they shall have reason to suspect that the sureties of a guardian are in failing circumstances, may compel the guardian to give additional security, and if he fail may displace him. It is apparent here again, that the only guardians spoken of are those appointed and who

* *Dagley v. Tolferry.*

Graham v. Houghtalin.

give security. This could not be the father; for he is not appointed, and therefore he not only cannot give security, but not having the custody of the estate, there is nothing for him to give security for. These are all the kinds of guardians named in the act of 1799, and as none of them can apply to guardians by nature or to their wards, it follows that the Orphans Court had no power to order this sale.

But again, this very 6th section of the act of 1799 shows upon its face, that it was never intended to apply to guardians by nature, but only to orphans who have somebody for guardians, who are not bound to support and maintain them.

The father, by all laws human and divine, is bound to maintain and educate his child. This 6th section, if it includes the father and his minor children, would reverse the whole order of nature and all human laws that were ever before passed. It takes from the father the duty to maintain and educate the child, and puts these obligations on the child itself. Such could not have been the intent of the law. When the father is dead, and the orphans are thrown on strangers, it is right and proper that the property of the child should be used to that end; and that was all the act of 1799, which was merely passed to make more intelligible the act of 1784, was intended, in this regard, to effect.

There are some cases reported, when the minor is very rich, and the father poor, where Chancery has allowed the parent a reasonable sum for maintenance out of the child's estate, but this is never more than to make his education to agree with his estate; but I have found no case where the Chancellor has allowed all a minor's estate to be sold for his education when the father is living. It is against the whole theory upon which such allowances are made. The allowances are made not to free the father from supporting the child, but that the child should be educated according to his estate, which, perhaps, the father could not afford to do.

It is apparent that the object of the act of 1799 was—1st, to require testamentary guardians, when the will does not provide otherwise, to give bond and account; 2d, to require

Graham v. Houghtalin.

all guardians appointed by public authority, whether the Chancellor, Ordinary, or Orphans Court, to give bond and account; 3d, to require guardians in socage to account; 4th, to give the Orphans Court greater control over the guardians thus named; 5th, to prevent obscurity—the 10th and 12th sections of the act of 1784, authorizing the sales of the lands of orphans—and not to extend the jurisdiction of the Orphans Court over minors who were not orphans, over a new and distinct class of individuals, a class entirely foreign to the jurisdiction of all cognate tribunals.

Such has, I understand, always been the judicial construction of this statute. Thus, in April term, 1829, in the case of *Garrabrant v. Sigler*, 1 *Halst. Dig.* 507, § 6, Chancellor Williamson decided that the Orphans Court had no power to appoint a guardian for a minor during the lifetime of the father, and that the Prerogative Court had no such power, nor could the consent of the father confer such jurisdiction. Now how could this be so if the Ordinary or Orphans Court had jurisdiction over minors who were not orphans? Must not this decision have been founded upon the principle, that the Prerogative Court and the Orphans Court had jurisdiction only over orphans and their estates, and that minors not orphans, were matters entirely belonging to other jurisdictions? I regret much that this opinion of Governor Williamson has not found its way into our reports, as I have no doubt it would have thrown much light upon this obscure region of the law, and which, as Chancellor Pennington remarks in the matter of Coursen's will, 3 *Green's C. R.* 412, presents a wilderness of perplexity to the practitioner. The legislature, as I understand it, have also always put the same construction upon this act. This is manifest from the act of February 22d, 1843, *Penn.* 84, incorporated in the present act of 1846, *Nix. Dig.* 342, § 10,* which enacts, "that if any minor shall become seized of real estate in the lifetime of the father, it shall be lawful for the Ordinary or for the Orphans Court to appoint the father or other suitable person guardian

* *Rev.*, p. 760, § 38.

Graham v. Houghtalin.

of such estate." Does not this show that the legislature understood that, at the first passage of this act in 1843, it was considered that the estates of minor children who were not orphans, were a subject matter entirely foreign to the jurisdiction of the Ordinary and the Orphans Court, and that it was necessary to pass a special act to give them jurisdiction over such minors' estates.

But again, so early as 1825, *Elmer's Digest* 220, an act was passed entitled, "an act for the protection of the minor children of persons who abscond or absent themselves from this state," giving to the Orphans Court power to appoint guardians of such children in the same manner as guardians are now appointed by said court. This act, as it were, defines the act of 1799 as not including in the term guardian or ward, in that act, guardian by nature or a guardian of any ward who was not an orphan. The Circuit Court charged the jury, in this case, that the Orphans Court had jurisdiction. To this the defendant, of course, did not except.

The Circuit Court further charged, that the deed under this order might be impeached for fraud at law. The jury found for the plaintiff upon the question of fraud, and the defendant assigns this charge for error. Whether it was erroneous or not, depends entirely upon the question, whether the Orphans Court had jurisdiction. If they had, then it perhaps might have been erroneous for the court to charge that fraud could be inquired of at law; but if the Orphans Court had no jurisdiction, then it was a matter wholly immaterial whether the transactions attending the sale were fraudulent or not. The defendant had no more right to recover in the one case than in the other. If the Orphans Court had no jurisdiction, the defendant asked the court to charge matter wholly immaterial, and it was equally erroneous or equally lawful to charge the one way as the other. There could be no error in either case.

I think the judgment below should be affirmed.

VAN DYKE, J. I am not able to concur with the majority of the court in the conclusion to which they come.

Graham v. Houghtalin.

The order of the Orphans Court, directing the guardian to sell the real estate of his wards, was held, in the Circuit Court, to be a valid order. This court determines to reverse and set aside that decision, and hold the order to be a nullity, although no objection was made at the trial to the offering of such order in evidence, nor was any exception taken to its admission when received. And although the defendants' counsel seem to have contended, after the evidence was closed, before either the court or the jury, or perhaps both, that the Orphans Court had no power to make such an order, yet when the court charged otherwise, that the order was good and valid, the plaintiffs do not seem to have taken any exception thereto, nor to have asked for the sealing of a bill of the kind. The case is now before us on exceptions to the charge of the judge, taken by the defendants' counsel. They prayed him to charge in a particular way, which he refused to do, but charged directly to the contrary. To this charging the one way, and refusing to charge the other, the defendants excepted, and obtained a bill of exceptions. On these exceptions, thus taken and sealed, the only errors before us are assigned. To these errors, so assigned, and to these alone, by a series of decisions quite unshaken, I think we are now confined. How it is, then, that this order of the Orphans Court, which forms no part of the record proper in this suit, which was only a part of the evidence in the case, which was received without objection, which is in the case as made, but not within any of the exceptions taken, and which the party against whom it was received has in no way brought before us, and on which no error is assigned—how it is, I say, that this court can in this way, and under such circumstances, make the making of this order and its destruction the great turning point in the case, not for the purpose of reversing the judgment and setting aside the verdict which has been rendered as prayed for, but for the support of both, and yet for the ruin of the defendants' case, is more, I must confess, than I can well understand. At all events, I cannot concur in such proceedings. It seems like the voluntary turning

Graham v. Houghtalin.

aside to do that which no one asks us to do, and yet it is that which is fatal to one of the parties in the case.

But if this order were properly before us, I should be equally unable to concur in the disposition which has been made of it. This judgment of the Orphans Court is probably as solemn a one as it had power to render at the time. We are looking at it from a point of view purely collateral, and under such circumstances it is held by numerous authorities, and I think not denied by any one, that if the court had jurisdiction over the subject matter, as it is termed, with the right to make a decree in that kind of case, then the proceedings, even if clearly irregular and wrong, cannot be questioned in a collateral way; but if corrected at all, it must be by a direct appeal to the court itself where the proceedings were had, to correct the error, or by an appeal from it to some other tribunal having the power to reverse.

But it is said that the Orphans Court, in this case, had no jurisdiction over the subject matter. Now what is meant by a court having jurisdiction over a "subject matter?" It unquestionably means that the court has the right and power to act, and render a judgment or decree in that particular kind of case, or matter, or thing, either a right one or a wrong one. If it has no jurisdiction over the subject matter at all, then it has no power to render any judgment at all, either a right one or a wrong one. If it has the power to render a right judgment in this kind of case, then it has jurisdiction over the subject matter; and if it should render a very wrong one in such a case, it will be held good until it is directly reversed or set aside. And this is, perhaps, the best test to apply by way of settling the question. If a justice of the peace should take jurisdiction of, and render judgment in an action for slander, such judgment, no matter what kind of a one it might be, would be absolutely void, because he has no right to give a judgment at all of any kind. He has not jurisdiction of the subject matter, that is to say, he has no power to hear and determine that kind of thing at all, nor to touch it at all. But if he render judgment in an

Graham v. Houghtalin.

action of debt for less than \$100 without any evidence at all, it will be a wrong judgment; but it will be held good, when collaterally drawn in question, until it is reversed, because here he has jurisdiction over the subject matter, that is to say, he has jurisdiction in that kind of case and over that kind of thing, and has the right to give a judgment of some kind, either a right one or a wrong one. He had the right to touch the subject.

These principles are extended to almost, if not quite every species of tribunal, and very frequently to city authorities, in the passage of what are termed *judicial ordinances*; such ordinances, I mean, as require of the people, or some portion of them, to do some affirmative or positive act, such as the paving of the streets, and the like. In such cases, even if the law requires the city authorities, before passing such ordinance, to advertise their intention for a certain time, and in a certain way, or that the land owners should first petition for the passage of such ordinance, which would seem to be necessary to give the requisite jurisdiction; yet if they pass such ordinance without such previous advertisement or petition, if they had the power to pass that kind of ordinance, the courts have invariably refused to interfere with them in a collateral way, but have held them to be good until reversed in the proper manner.

What, then, was the subject matter which the Orphans Court, in this case, was called to act upon? It was simply an application to authorize or order a guardian to sell the real estate of his wards for their maintenance and education, their personal estate being insufficient for that purpose. Now can it be that this was not a subject matter or kind of thing over which the Orphans Court had jurisdiction, which they had no right to touch? Why, it is the very thing which the 6th section of the act of 1799 expressly authorizes them to do. That court certainly had jurisdiction over the application, and had the right either to grant it or refuse it, as the facts and circumstances should require, and their decision either way *might* have been perfectly right and perfectly

Graham v. Houghtalin.

legal. This, I think, cannot be controverted. If, then, that court could lawfully receive and consider of such an application, and grant it, and make the order to sell under any circumstances, it must have been because they had jurisdiction over the subject matter, over that kind of thing; for if they had no jurisdiction over the subject matter, then they had no right to touch the subject at all, and could not make a lawful decision either way; and if they had jurisdiction over the subject matter, so that they might lawfully make a decision either way, then it is a case, according to all the authorities, where this court will not hold their decision to be null and void, although admitted to be erroneous when raised collaterally.

The only ground which I have heard suggested for denying the jurisdiction of the Orphans Court is, that it does not appear that the person claiming to be the guardian was such. It certainly does not appear that he was not; and the reasons for insisting that he was not are—first, because no such appointment is found on the records of the Orphans Court; and secondly, because the father could not be the guardian for such a purpose without an appointment, if he could be at all.

It was probably a useless effort to search the records of the Orphans Court for such an appointment, as it is supposed that that court at that time had no such appointing power. They had something to do in such cases, but were not required to make a record of it; but their proceedings being certified to the Ordinary, he issued the letters of guardianship; consequently the finding of no such record can amount to nothing.

In 1820, the power of the Ordinary to appoint guardians was transferred to the Orphans Courts of the counties, and yet, in 1824, Chancellor Williamson is said to have held, that the power of the Orphans Court in the appointment of guardians was confined to appointments for *orphan* children; that an orphan was one who was fatherless, and consequently that the *Orphans Court* could not appoint a guardian for a

Graham v. Houghtalin.

minor child while his father was living ; but he did not decide, so far as we can learn, that such minor child could not have a guardian, so far at least as his property was concerned, nor that the father could not be such guardian. So far as the guardianship and control of the *person* of a minor was concerned, unquestionably the father was the natural guardian : no other was needed, and no stranger could well be appointed to that office consistently with the relationship existing between parent and child ; but so far as the estate of the minor was concerned, the case was entirely different. The father, to be sure, was bound to support his minor children ; but the father might be a beggar, with a large family of children, each of whom might have sufficient property, received by devise, grant, or otherwise, to support and educate them ; but without the use of this property, which might be, like that now before us, not subject to their immediate use, they must grow up in ignorance and pauperism, for the father, as such, cannot touch this property ; he has no control over it, nor could the Ordinary or the Orphans Court aid him in the disposition of it. A guardian must be appointed, and he, and he only, under the control of the proper court, can dispose of it, whether there be much or little, and thereby appropriate it for the proper and necessary maintenance and education of the children during their minority. That such a guardian might have been created for such a purpose at the time of making the order before us ; that such guardian might have been the father of the children, and that under an order of the Orphans Court he might lawfully have sold their real estate, or so much as was necessary for their maintenance and education, does not seem to admit of a doubt.

The Orphans Court, in their order, recognized this father as the guardian of his children ; they called him guardian, and they treated him as guardian, but how he became such they did not insert in their order, nor was it necessary for them to do so ; nor have they inserted the evidence by which his guardianship was manifested to them, nor was it

Graham v. Houghtalin.

necessary for them to do so. The court say that their order was made on full examination. The evidence on which they made that examination was before them; it is not before us, and it is neither our duty nor our right to attempt to determine in this way that the evidence on which they acted was insufficient, or that their decision was unwise or even illegal in itself, and ought to be reversed. This is the very inquiry which all the decisions declare we have no right to make.

In the case of *Voorhees v. The Bank of the United States*, 10 *Peters* 472, in an opinion of immense power and force, in which this same kind of question was before the Supreme Court of the United States, Judge Baldwin, among other things, says: that "the defendants, in resting their case on the only position which the record leaves them, necessarily affirm the general proposition, that a sale by order of a court of competent jurisdiction may be declared a nullity in a collateral action, if their record does not show *affirmatively* the *evidence* of a compliance with the terms presented by law in making such sale. We cannot hesitate in giving a distinct and unqualified negative to this proposition, both on principle and authority too long and too well settled to be questioned." That is the case here; it is sought to go behind the order of the court, to see if it complied with the terms prescribed by law in making such sale. Nay, we are called to go much further, and say that the evidence on which they acted in making the order, although we do not know what it was, was insufficient to make their determination strictly legal.

This language of Judge Baldwin, with more of the kind, is quoted by Chief Justice Green, in the case of *Stokes v. Middleton*, 4 *Dutcher* 32, with high approval; and he does so, he says, because it meets all the objections which had been urged against the plaintiff's title in that case. "Thus (he says) it is urged that there is no proof that there was an application for partition, or that the land could not be divided, or of any order of sale. But there is a recital of those facts in the order of confirmation, and an express adjudication

Graham v. Houghtalin.

approving the sale and directing conveyances to be executed. The approval and confirmation of the sale became a part of the record, which thenceforth *proves itself* without referring to the evidence on which it has been adjudged." If these authorities do not cover the case before us; I know not what will.

The statute contemplates at least three different kinds of guardians. There is no reason why the father may not have become such guardian in some one of the ways referred to. It does not appear that he was not. That was a proper question for the Orphans Court to investigate and decide. The presumption is that they did so. They say they did, and that he was. The order in this respect is perfect. In the language, then, just quoted, it now proves itself without referring even to the evidence on which it was adjudicated.

Having reached the conclusion that this order of the Orphans Court is valid and binding upon us, and that the purchaser under it took a good legal title to the premises sold, while the verdict of the jury is destructive of that title, it becomes necessary to inquire whether anything occurred at the trial to which exception was taken, and on which error has been assigned, to render that verdict unlawful.

The plaintiffs, in reply to the proceedings in the Orphans Court, and the deed made in pursuance thereof, allege fraud in the proceedings on the part of the guardian, such as should vitiate the deed, and render void the sale, even in the hands of the present owner. The defendant's counsel asked the court to charge the jury that there was no evidence before them from which they could infer fraud, especially against the present purchaser. This the court refused to do, but charged directly to the contrary, that there was evidence from which they could infer such fraud as would render void the sale by the guardian; that Holsman stood in no better situation than Doremus did; that they had a right to look at the fact, that the deeds of Doremus and Ryerson were of the same date; that they had a right to look at the guardian's account, as filed in the Orphans Court, and at Doremus' poverty, as an inducement for fraudulent conduct. I

Graham v. Houghtalin.

am forced to think that much, if not all of this charge is erroneous. There was no evidence of fraud on the part of Holsman, or of his knowledge of any on the part of Doremus, the guardian, which could justify the jury in finding a verdict against his title on that ground. He obtained his title some two or three years after the sale by Doremus, and then at sheriff's sale under the foreclosure of a mortgage. It does not appear that he ever saw Doremus, or that he had ever heard even a whisper, that there had been anything unfair or dishonest in the transaction. It is not pretended that the property was sold at too low a price. Judge Dickerson says it was a fair price; and if the purchase money had been put at compound interest, from the time of sale to the death of the tenants for life, it would have been more than ten times that amount.

Whatever Doremus may have known or intended, there is no particle of evidence that Holsman had any knowledge or notice that there had been anything wrong, except so far as he could learn it from the public records. The jury were charged, that they might, as evidence of Holsman's knowledge of fraud, take into consideration the account which Doremus had filed as the basis of his application. In this, I think, he was wrong. That account had been before the Orphans Court, and had been passed on by them. This that court had an undoubted right to do; and as he had never heard the *bona fides* of their transaction called in question, that account cannot be considered as evidence, to him, to the contrary. Nor does the account, upon its face, show to a stranger anything necessarily fraudulent, or from which he was bound to infer it. The guardian simply charges each of his children a dollar per week for their board, clothing, and education, which, if he had a right to charge them at all, cannot be considered in itself extravagant or unreasonable.

The jury were also charged, that they might, as evidence of fraud against Holsman, take into consideration that the deeds from Doremus to Ryerson, and from him back to Doremus, bore date on the same day. I am aware that such a

Graham v. Houghtalin.

fact has been held a kind of legal fraud in courts of equity, but I cannot agree that that mere fact in a court of law, as against a stranger who knew nothing of the transaction, is to be considered as *per se* evidence of fraud. If the parties in such cases intended fraud, they would probably do the thing differently; and I think that all experience shows that at least nine of the cases out of ten, when such occurrences have taken place, have been the result of benevolent and friendly feelings towards the persons whose lands were thus sold, and done for their benefit and interest, and not to their disadvantage; so that no legal conclusion can fairly be drawn that such transactions are of themselves evidence of fraud. It is not evidence of *fraud* in courts of equity, although by a strange use of language it has been so termed. The truth is, that when an executor, guardian, or trustee sells the lands of his *cestui que trust*, and becomes the purchaser himself, either directly or indirectly, the courts of equity, who have these matters peculiarly within their province, hold him to have acted still as a trustee in the matter, and will compel him to account to his *cestui que trust*, so as not to turn the transaction to his own advantage.

The jury were also charged, that Doremus' poverty might be taken into consideration as against Holsman as the evidence of fraud. In the first place, there is no evidence whatever that Holsman had any knowledge of the poverty of Doremus; and if he had, I could never consent that it shall become established as a principle of law, that poverty is evidence of dishonesty or corruption. It may be considered as evidence of the necessity under which Doremus was, which led him to pursue the course he did, but cannot of itself be considered as evidence of fraud.

I do not question the right of the courts of law to investigate questions of fraud in certain cases, nor of an heir at law to institute an action of ejectment to recover the lands of his deceased ancestor; but I think, nevertheless, that in all that class of cases where such lands have been sold under an order of a court of competent jurisdiction, in any of the

Graham v. Houghtalin.

forms in which such proceeding can lawfully take place, and when the heir, or his assignee, with such proceedings on the public records, intends to assail them on the ground of fraud or other defect, and to set them aside, and establish his title in defiance of them, he should be compelled to do so in a court of equity: for it generally, perhaps invariably, happens that the purchasers at such sales, even when it is the trustee himself, has paid a consideration, perhaps a full and honest one, and has equities that ought to be fairly adjusted if he cannot hold the lands. These equities the Court of Chancery has full and complete power to arrange according to what is just and right; but the courts of law, it is well known, can do no such thing, but are perfectly powerless in the matter. All they can do is to strip the purchaser of his lands, no matter how much he may have paid for them, for the benefit of the heir, if the action is sustained at all, and then leave him without redress, unless he, in turn, betakes himself, through a multiplicity of suits, to a court of equity in pursuit of the justice which could easily have been administered to both parties, if the proceedings had been at first commenced in that court.

For affirmance—Judges COMBS, CORNELISON, ELMER. FORT, GREEN, HAINES, KENNEDY, WALES, WOOD—9.

For reversal—VAN DYKE.

INDEX.

ACTION.

1. If a constable seize goods as the property of A., upon execution against him, which were in fact the property of A. and B., and sell and deliver the entire property, B. may maintain trespass. *Farrell v. Colwell et al.*, 123
2. If the title of one partner to a moiety of partnership chattels be bad as against an execution creditor, and the title of the firm be good as to the other moiety, both partners may maintain a joint action in trespass against the officer seizing and selling the entire property. *Ib.*
3. If B. and C. sue in trespass for taking goods in which C. had no property, and B. owned one half, and no notice is given of a misjoinder pursuant to the statute (*Nix. Dig.* 665, § 129,) B. is entitled to recover damages to half the value of the property. *Ib.*
4. An agreement to sell and exchange a horse and money for money and a piece of land, is within the statute of frauds, and an action for damages for refusal to convey the land cannot be sustained on a verbal agreement. *Rutan v. Hinchman et al.*, 255
5. Money bet on the result of a horse race, and deposited with a stakeholder, may be recovered back before the contract is executed. *Sutphin v. Crozer*, 257
6. It seems that the representatives of one of the defendants in a joint judgment who has died may be sued, although the other defendant is living. *Parker v. Thompson*, 311
7. To support an action upon a physician's bill, the plaintiff must prove that he has been duly licensed or has a diploma, as pre-

scribed by the act incorporating medical societies. *Dow v. Haley*,

354

8. M. owed R. for board, and in 1849 sold a lot of land to D. In consideration thereof, D. promised M. that he would pay, as part of the consideration money, to R. \$100 per year after the death of M., as long as R. should live. M. died in 1849, and R. in 1858. On an action of assumpsit, brought by the administrator of R., D., in 1859—*Held*, that it was no ground for nonsuit, either because of the statute of limitations, nor because it was a suit brought for an annuity, nor because it was an attempted testamentary disposition, nor because it was a proviso to pay the debt of another, nor because it was an agreement to be performed within one year, nor because it was an attempt to create a trust. *Berry's adm'r v. Doremus*, 399

See RAILROADS.

ADMINISTRATION BOND.

1. A bond, by an executor or administrator, to the Ordinary of the state, which varies from the form prescribed by the statute, if voluntarily given, and not made void by statute, is good. *Ordinary v. Cooley*, 179
2. When, by the condition of such bond, the executor or administrator is required to render a just and true account concerning the sale, an assignment of a breach of such condition, that he had not rendered a just and true account of his administration of the moneys arising from the sale, is bad on demurrer. *Ib.*

3. One of the conditions of an ordinary administration bond is, that the administrator will pay over to the persons entitled all the residue of the goods and chattels found remaining upon the account of the administrator. *Held*, that it is no breach of this condition that the administrator has or has not paid over to the creditors their *pro rata* share ordered to be paid to them by the Orphans Court, and that the remedy of the creditors is under the other conditions of the bond. *Same v. Same*, 271
4. The history and origin of the different conditions of the administrators' bond commented upon. *Ib.*

ADMISSIONS.

See EVIDENCE.

AGREEMENT.

1. Agreement to sell and exchange a horse and money for money and a piece of land, is within the statute of frauds, and an action for damages for refusal to convey the land cannot be sustained on a verbal agreement. *Rutan v. Hinchman*, 255
2. An agreement whereby the plaintiff granted a right to the defendant to erect a mill dam, and stop a ditch on his land, and the defendant agreed that all damages sustained should be paid by him, held to mean such damages as the plaintiff might from time to time demand. The case of *Van Schoick v. Canal Company* held not applicable. *Houglond v. Veghte*, 516

ASSESSMENT OF TAXES.

1. An assessment for taxes, under the charter of Jersey City, on ferry boats and a quantity of coal, alleged to belong to the Pavonia Ferry Company, set aside on testimony showing that the ferry company had no interest in such property. *The State, Pavonia Ferry Co., v. Richards*, 266
2. The question, whether the ferry company have power to delegate their right of ferriage, cannot be raised in this case, where the question is, whether the prosecutors are or are not the owners of the property upon which the tax has been assessed. *Ib.*
3. The council has no right to assess the expenses of improving a street, incurred by individuals by authority of the council, which was not contracted for or superintended by the council. *State, Van Horn, v. Town of Bergen*, 307
4. The decision of the case, *5 Dutcher* 266, concurred in. The assessors were bound to show that they took into consideration all the real estate of the town, and determined what part was benefited. *Ib.*
5. An act of assembly, directing that, in case an assessment should be set aside, new assessors should be appointed, held not to authorize a new assessment against an individual whose tax was not set aside, but had been paid and accepted by the council. *Ib.*
6. On petition to a municipal authority, asking that a street may be paved, the city council may regulate the surface of the street, by filling and excavating preparatory to paving it, and include, as a necessary incident, the costs of such grading in the assessment for the costs of the paving. *State, Hand, pros., v. City Council of Elizabeth*, 365
7. Assessments for the paving of intersections, under the charter of the city of Elizabeth, must be confined to the line of the street on which the improvement is applied for. *Ib.*
8. It is not necessary, in order to give the city council of Elizabeth jurisdiction, that it should appear by their minutes that they had appointed a day to hear persons objecting to the improvement, or interested therein; it is sufficient if such notice of hearing, drawn in compliance with the provision of the charter by order of the city council, be regularly advertised by the city clerk. *Ib.*
9. An incorporated city has jurisdiction over a turnpike road constructed within the limits of the

- city, for the purpose of regulating, grading, and paving it; but has no right to regulate and grade the street so as to injure the turnpike company, or to interfere with their chartered rights: for police purposes, it has authority to make such municipal regulations as it may deem expedient. The common council has no right to require the turnpike company to grade or pave their road; but if the road be regulated, graded, and paved under a city ordinance, and the owners of adjoining lots assessed for the expenses of the same, it is no excuse for refusing to pay such assessment that the rights of the turnpike company are infringed. *State, Parker, v. Mayor of New Brunswick*, 395
10. The owners of adjacent lots have no vested right to require the turnpike company to bear the expenses of such grading, &c., nor to have the road continued at its original grade. *Ib.*
11. It is no objection to an ordinance for such grading, &c., that the fee of the soil of the road is in the turnpike company. *Ib.*
12. If an ordinance requires a street to be properly regulated and graded, &c., without any fixed grade being established, and afterwards provides that the work be done under the superintendence of the city paver, or other person appointed by the common council, and this is in accordance with the terms of the charter, it is sufficient. *Ib.*
13. On a *certiorari* to set aside an assessment imposed by a meeting of the taxable inhabitants of a school district, (*Nix. Dig.* 780) the court will not decide the legal existence of such corporation, or the legality of the election or appointment of the persons who acted as trustees to incorporate the district. *State, Winsor, v. Donahay*, 404
14. The certificate of the trustees of the proceedings of a meeting to order money to be raised by taxation, need not set forth the places at which the notices of the meeting were set up; if in the words of the act, "in at least three public places in said district," it is sufficient. *Ib.*
15. Under the act of 1862, private corporations must be assessed at the full and actual value of their capital stock, and not on the full amount of their capital stock paid in. *The State, Glouc'r Manufact. Co. v. Hallam*, 405
16. The provisions of several apparently conflicting sections of the act discussed. *Ib.*
17. A *certiorari* to remove and set aside an assessment for improving, curbing, and guttering a street, which the prosecutors allege encroaches on their property, is not the proper mode of trying the title of the prosecutors to the lands in question. *The Mayor, &c., of Jersey City v. The State, Howeth, pros.*, 521
18. An assessment will not be set aside merely because the money has been expended upon land not properly subjected to public use. *Ib.*
19. A notice of intention to pave a street, unless otherwise expressed, refers to a street as it is, *de jure*. *Ib.*

See TAXATION.

ATTACHMENT.

Attachments for not obeying a *mandamus* to open a road, served on an overseer after he went out of office, and on the new overseer, refused. *State v. Elkinton et al.*, 335

See OVERSEERS OF HIGHWAYS, 1, 2, 3.

MANDAMUS, 2, 3, 4.

ATTORNEY AND CLIENT.

The statement of counsel in a justice's court, made several months after the trial, and when he had ceased to represent his client, cannot bind the client. *Janeway v. Skerritt*, 97

BETS AND BETTING.

See GAMING.

BILLS OF EXCHANGE.

In order that a promise to accept a bill shall amount to an acceptance, the holder must have taken the bill on the faith of the promise, and until such negotiation there is no acceptance; it amounts to nothing but a contract between the drawer and drawee collateral to the bill, which, like all other contracts, must have a consideration to support it. *Overman v. Hoboken City Bank*, 61

See PROMISSORY NOTES.

BOND.

A declaration alleged, that whereas the defendant, by a certain bond, did recite that he held a bond and mortgage given by J. A. S. to him, as trustee, to be appropriated by the defendant to the support of one M. S. during her life, and to pay the residue that might remain in his hands to the plaintiff.

Held that a plea averring that the land covered by the mortgage has been sold, and all its proceeds absorbed by prior encumbrances, is a good defence. *Stuats v. Bergen*, 131

See ADMINISTRATION BONDS.
OFFICIAL BONDS.

CANCELLATION OF JUDGMENTS.

See JUDGMENTS.

CAPIAS AD SATISFACIENDUM.

1. A *ca. sa.* cannot be issued pending proceedings under the act to prevent fraudulent trusts and assignments. *Bonne v. Titus et al.*, 340
2. The plaintiff is a competent witness on an application for a *ca. sa.* *Ib.*
3. It is not sufficient for the commissioner to decide that there was proof, to his satisfaction, that the defendant had rights or credits, moneys or effects, either in his own possession, or in the possession

of some other persons; in the words of the act, he should specify by means of which of the several things mentioned, the fraud was committed. *Ib.*

4. A statement, that defendant made certain representations to plaintiff, and that he had discovered recently they were false, is not sufficient evidence that the debt was fraudulently contracted. *Ib.*
5. The statements made by the defendant, when examined under the trustee act, cannot afterwards be sworn to as evidence of fraud to procure a *ca. sa.* *Ib.*

CERTIORARI.

1. Where a city charter authorizes street improvements to be made, or work done only on the application in writing to the council of a majority of the resident owners of property lying along such street, it should appear in the return to the *certiorari* bringing up for review the proceedings of the city council, that the application is signed by a majority of the resident owners; the burthen of proof is on the defendants, and such fact, being a jurisdictional one, must appear on the face of the proceedings. *State, Woodruff, v. Council of Elizabeth*, 176
2. If it appear by the return to a writ of *certiorari*, that the same subject matter has been heard and adjudged by the court on a former *certiorari*, to which the present prosecutor was a party, and that judgment thereon was rendered against him, the writ will be dismissed. *State, Malone, v. Water Commissioners*, 247
3. A party wishing a review of an assessment for a municipal improvement must exercise reasonable diligence; and if it appear that the work has been done, and the assessment for it satisfied more than three years before the *certiorari* was allowed, the court will dismiss the writ. *Ib.*
4. The allowance of a common law writ is a matter of discretion; and whenever, in the progress of a cause, the court discovers facts

which, had they been disclosed on the application for the writ, would have induced a refusal of the *allocatur*, the court may, of its own motion, dismiss the writ. *Ib.*

5. A *certiorari* to remove and set aside an assessment for improving, curbing, and guttering a street, which the prosecutors allege encroaches on their property, is not the proper mode of trying the title of the prosecutors to the land in question. *The Mayor, &c., of Jersey City v. The State*, 521
6. The Supreme Court cannot, upon affidavits taken upon a *certiorari* to remove an assessment, either properly or conveniently try title to lands, and settle disputed facts involving a determination of questions of fraud and intention. *Ib.*
7. A *certiorari* for the purpose of removing an assessment, brought within a reasonable time after the assessment was ratified and confirmed, will not be dismissed because the ordinance which is thus brought incidentally in question was passed a long time previous. *The State, Doyle, v. Newark*, 303

See JURISDICTION.

SURVEYORS OF HIGHWAYS.
ASSESSMENT.

CHECK.

1. Whether a failure to return a check (when sent to the bank on which it is drawn) in a reasonable time amounts to an acceptance, must always depend on the particular circumstances of each case. A failure to return is not of necessity an acceptance; they are not convertible terms. *Overman v. Hoboken City Bank*, 61
2. The general rule is, that the holder of a check is bound to present it for payment in a reasonable time, and if not paid, to give notice thereof to the drawer in a like reasonable time. What is reasonable time will depend upon circumstances. *Taylor v. Sip*, 284
3. What considered reasonable time in the case of a check post dated, and deposited for collection upon the day of its date. *Ib.*

4. A check post dated must be considered as issued the day it bears date.—*Per WHELPLEY, Ch. Just.*
Ib.

CLEARING HOUSE.

1. Without stating in the declaration that the association called the "clearing-house" is an institution authorized by special legislation, or any authority existing in such association, in any way, to alter or modify the law merchant in regard to checks or commercial paper, such association cannot be held to have power to make usages or rules to bind those who are not parties to its organization. *Overman v. Hoboken City Bank*, 61
2. Its usages and rules, if not in conflict with law, may, by the implication of tacit adoption in the contracts of members, bind them in the same way that a general usage of trade may bind those who deal with reference to it, and who are therefore held impliedly to adopt it. But those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption, and bound by them *inter sese* only. *Ib.*
3. Customs and usages in derogation of the common law must be strictly pleaded, and when well pleaded the count must show a case clearly within the usage. *Ib.*

CLERKS' FEES.

Under the act respecting conveyances (*Nix. Dig.* 131, § 9,) and the act respecting mortgages, (*Nix. Dig.* 550, § 1,) the clerks of the Courts of Common Pleas are entitled to charge all persons making searches the "fees allowed by law." The fees are allowed for searches as well as for transcripts. *Fleming v. Clerk of Hudson*, 280

COMMISSIONERS OF APPEAL.

1. All parties are bound to take no-

tive of the day appointed by law for the meeting of the commissioners of appeal in cases of taxation; but if the commissioners meet at any other time than that appointed by law such meeting must be upon notice, and must also be at the place of holding the town meeting, in order to obtain jurisdiction of the person of the assessor; and they cannot, therefore, without such notice alter his assessment. *Nixon v. Ruple*, 58

2. The tribunal of the commissioners of appeal is a special tribunal, and it is well settled that such tribunals should show upon the face of their record, all facts necessary to give jurisdiction. *Ib.*

See JURISDICTION.

COMPROMISE.

See CONSIDERATION.

CONFESSIONS OF PRISONERS.

A murder was committed on the 8th March, 1863. On the 30th of March, the prisoner confessed to G. H. and to the sheriff, that he did it. On the 2d of April, the defendant confessed the whole thing in writing before the justice. On the 15th April, he confessed the fact again to T. M., and on the 20th of April, again to T. R. A verdict of guilty being rendered, the court suspended judgment, and certified the case to this court for their advisory opinion, as to whether the Oyer should grant a new trial, on account of the illegal admission of the said confessions.

Held, that even if the original confession were illegally admitted in evidence, because obtained by undue promises and threats, yet that the court would decline to advise a new trial, unless the subsequent confessions were specially objected to in the Oyer, on account of their having been obtained under the influence of the original promises or threats. The case not having any such special objections, this court will presume that the Oyer

were satisfied, as a question of fact, that the subsequent confessions were not produced by the influence of the original promises or threats. And upon a review of the facts, this court, seeing no reason to doubt the correctness of the admission of such subsequent confessions, will not advise a new trial. *State v. Brooks*, 357

See CRIMINAL PROCEEDINGS.

CONSIDERATION.

A suit was brought by the plaintiffs against the defendants on a note purporting to be for \$1500. The defence set up was forgery: the parties compromised the suit by the defendants giving the plaintiffs a new note for \$1000; and upon suit brought on the last note—*held*, that the compromise was a good consideration for the new note, and that the defendants could not set up as a defence that the first note was a forgery. *Grant & Kelly v. Chambers*, 323

CONSTITUTIONAL LAW.

1. The seventh section of the act of 1854, *Nix. Dig.* 851, assessing the tax on the mortgagor, where the mortgagee resides out of the township, is not unconstitutional as impairing the obligation of contracts, and the oath of the collectors and their receipts are *prima facie* evidence of the proper payment of such tax. *Cook, ex'r, v. Smith*, 387
2. A law laying a special tax on the business of foreign corporations, regularly doing business in this state, transporting passengers and merchandise across the state, from and to foreign states, such tax being graduated by the number of the passengers and the weight of the goods carried, is not an infringement of that clause of the constitution of the United States which gives to congress the power to regulate commerce among the several states. *State v. Del. and Lack. R. R. Co.*, 473
State v. Erie Railway, 1b.

3. Such commerce is not of such a national character, that a state may not regulate it in the manner complained of, without violating the constitution of the United States. *Ib.*
4. Such tax is merely a tax upon the company, in proportion to the number of passengers and weight of merchandise transported by them within this state, and not a regulation of commerce among the states. *Ib.*
5. A foreign corporation, upon which has been conferred by the legislature of this state the power to purchase and hold lands in this state, does not, by reason of such legislative action, lose its foreign, and acquire a domestic character. A corporation can be properly said to exist only in the state which created it. *Ib.*

CONTRACT.

1. Conover agreed to sell Cornelius Petty all the corn he had to sell, supposed to be in all about 600 bushels, the white at 65 cents, and the yellow at 63 cents per bushel. C. delivered the white, and offered to deliver the yellow, which Petty refused to receive: *held*, that the contract was an entirety, and the refusal of the plaintiff to receive the yellow was a repudiation of the contract, and that C. could recover the value of the white in trover, and that he could do so even if, before demand and refusal, Petty had so mixed the whole corn as that it could not be identified. It was not error in the court charging the jury that C. could recover, even if the corn had been ground before demand and refusal. *Thompson v. Conover*, 329
2. When the seller contracts to send a horse to the purchaser in New York, to be paid for when received in the city, the risk of the horse is upon the seller until the horse is delivered in New York. *Perrine v. Serrell*, 454

CONTRACTS IRREPEALABLE.

See RAILROAD CHARTER.

CORPORATION.

1. The bonds issued by this state under the act of 1861 (*Laws 1861, p. 554*), are exempt from taxation when held by individuals or corporations. *Newark City Bank v. The Assessor, &c.* 1
2. The stocks and securities issued by the United States under the power to borrow money are exempt from state taxation in the hands of individuals or corporations. *Ib.*
3. Stocks in foreign corporations, held by individuals resident in this state, are personal estate within this state, and subject to taxation. *Ib.*
4. Corporations are entitled to have deducted from the amount of their capital stock paid in, and accumulated surplus, the amount of the bonds of this state and the stock and public securities issued by the United States owned by them at the time of assessment. *Ib.*

See FOREIGN CORPORATIONS.
MUNICIPAL CORPORATIONS.

COUNTIES.

1. The inhabitants of counties were not indictable at common law for not repairing bridges over canals, but only bridges over rivers. *State v. Inhabitants of Hudson*, 137
2. The inhabitants of counties in this state are not indictable for not repairing bridges over rivers in this state. *Ib.*

See INDICTMENT, 10, 11.

CRIMINAL PROCEEDINGS.

1. On a trial for murder, it is not a sufficient objection to the panel of jurors served upon the prisoner that it is not according to the statute. The particular objection should be pointed out. *State v. Brooks*, 356
2. A panel headed "petit jury, April term, 1863," containing the names of forty-eight jurors, and the names of the townships where they reside abbreviated, is sufficient, if served on the prisoner at the same

time with the copy of the indictment, if the abbreviations are such as clearly to indicate the residences of the jurors. A cross over the name of one of the jurors will not vitiate the panel, if it leaves the name of such juror plainly legible.

Ib.

CURTESY.

See DEED.

CUSTOM AND USAGE.

Customs and usages in derogation of the common law must be strictly pleaded, and when well pleaded, the count must show a case clearly within the usage. *Overman v. Hoboken City Bank*, 61

See CLEARING HOUSE.

DAMAGES.

1. If B. and C. sue in trespass for taking goods in which C. had no property, and B. owned one half, and no notice is given of a misjoinder pursuant to the statute, B. is entitled to recover damages to one half the value of the property. *Farrell v. Colwell*, 123
2. If no question was made at the trial in regard to the amount of damages in case C. was not proved to be an owner, and the court was not asked to charge on the point, and it appears that damages to the full value were given, the judgment will not be reversed. *Ib.*
3. Damages for taking a horse may be what he was worth in the business in which he was employed by the plaintiffs. *Ib.*
4. When a railroad company is sued for damages sustained by a collision on their road, induced by the negligence of the company or their agents, and it appears that the party injured was himself guilty of such negligence or want of reasonable care as contributed to the doing of the injury, there can be no recovery. *Telfer v. Northern R. R. Co.*, 188

5. "In crossing ordinary roads, caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads, it is exacted to avoid being run over yourself. In the former case the blame attaches *prima facie* to the party doing the injury; in the latter, it attaches, in the first instance, to the party obstructing the track."—*Per VAX DYKE, J.* *Ib.*
6. In an action under the statute to recover damages for death caused by negligence, only the pecuniary loss or injury sustained by the plaintiff can be allowed; and in estimating that, the chances of health and life are to be considered in connection with the value of services. *Ib.*
7. The reciprocal duties of railway companies and persons crossing their roads discussed. *Ib.*
8. Under a warranty that a horse is sound and kind, and that if he should not suit, the seller would take him back, and send the purchaser another, held that the warranty as to unsoundness was independent, and that the right to provide another horse under the contract did not extend to unsoundness; that the horse being unsound, and having died, the purchaser could recover damages, and was not obliged to call upon the seller to furnish another horse. *Perrin v. Serrell*, 455
9. The measure of damages in such case is the difference between the horse, if sound, and as he actually was. Expenses paid by the plaintiff in delivering the horse in New York to be allowed. *Ib.*
10. An agreement, whereby the plaintiff granted a right to the defendant to erect a mill dam, and stop a ditch, on his land, and the defendant agreed that all damages sustained should be paid by him, held to mean such damages as the plaintiff might from time to time sustain. The case of *Van Schoick v. Canal Company*, *Spencer* 24, held not applicable. *Hoagland v. Veghte*, 516

See STATUTE, CONSTRUCTION OF.

DEEDS.

1. A deed made by A. B. in consideration of love and affection, and of one dollar, to C. D., wife of E. F., in which the said A. B. doth grant, bargain, sell, alien, remise, release, and confirm certain real estate to the said C. D., during her natural life, and at her death to her children which may be begotten of her present husband; to have and to hold the said premises unto the said C. D. for and during her natural life, and at her death to her children which may be begotten of her present husband, E. F., and containing covenants of seizin and general warranty, which are made by the grantor for herself and her heirs, with the grantee and her heirs and assigns, conveyed to the grantee an estate for life only, with a remainder vested in G. H., a child of the said C. D., for life, subject to open, and let in after-born children to the same estate. *Adams et al. v. Ross*, 505
2. The estate created was not an estate in fee or in fee tail, there being in the grant no words of inheritance or procreation. *Ib.*
3. The covenants warranting the premises to C. D. and her heirs did not enlarge the estate, nor pass by estoppel a greater estate than that expressly conveyed. *Ib.*
4. A warranty attaches only to the estate granted, or purporting to be granted. If it be a life estate the covenantor warrants nothing more; the conveyance being the principal, the covenant the incident. *Ib.*
5. In the construction of a deed, the question is, not what estate did the grantor intend to pass by proper and apt words. No expression of intent, no amount of recital showing the intention, will supply the omission. *Ib.*
6. A mortgage made after the conveyance, and while the said C. D. was a minor, created no valid charge on the estate against the said C. D. *Ib.*
7. The grant made to C. D. was within the provisions of an act for the better securing the property of married women, passed March 25th, 1852, the deed being subsequent to the act. *Ib.*
8. The husband not entitled to curtesy in the premises on surviving his wife, the grantee. *Ib.*
9. A deed was made, on the 31st August, 1810, by G. G. to D. and E., his wife, conveying to the said D. and wife the premises in question, for and during their natural lives, and the life of the survivor of them, and after their decease, to the children of the said D. by his said wife, and to their heirs and assigns for ever. *Held*, that the remainder vested in the children living at the date of the deed, subject to open to let in after-born children. *Graham v. Houghtalin*, 552
10. On the 15th June, 1818, the said D. and his wife were still living, and had then six minor children, and afterwards had two more born. On the said 15th June, D., as the guardian by nature of his children, obtained a decree of the Orphans Court of Essex to sell the said lands for the support of said minors. *Ib.*
11. In an action of ejectment, brought by the children against the purchaser, after the death of D. and wife, *held* that the two children born after the sale were not affected by it. *Ib.*
12. *Held further*, that the other children, being minors, and not orphans, at the time of the decree for sale by the Orphans Court, were not bound by the decree; that the Orphans Court had no jurisdiction over the subject matter, and that a sale under the decree was void, and conveyed no title. *Ib.*

DELIVERY.

1. Title to goods and chattels may pass by gift *inter vivos* when there is a delivery of the property. Mere delivery of the goods will not in general pass the title; there must be an intention to give accompanying the act of delivery in order to consummate the gift, or the circumstances attending the delivery of the goods must be such as ordinarily accompany a gift,

inducing the donee to believe that a gift was intended. If that be the case, the title to the goods will pass, although it may not be the secret intention of the donor to make a gift.

2. When a gift is completed by delivery and acceptance of the chattel, it is irrevocable. So long as there is no delivery and acceptance it may be revoked. *Betts v. Francis*, 152

DEVISE.

1. A devise of "one acre of land joining the road leading from Metuchin to Bonhamtown on the west, and my house lot on the east"—held, that the house lot was only descriptive of one of the boundaries of the one acre lot, and that the house lot did not pass by such devise. *Nevius v. Martin*, 465
2. If there be no latent ambiguity, the construction of a will must be drawn from the words, and parol testimony cannot be admitted to supply, contradict, enlarge, or vary the words, or to explain the intention of the testator. *Ib.*

DISORDERLY HOUSE.

See INDICTMENT.

DISTRIBUTION.

See EXECUTION.

DUE DILIGENCE.

See PROMISSORY NOTES.

ELIZABETH CITY CHARTER.

1. Assessments for the paving of intersections, under the charter of the city of Elizabeth, must be confined to the line of the street on which the improvement is applied for. *State, Hand v. Elizabeth*, 303
2. It is not necessary, in order to give the city council of Elizabeth juris-

diction, that it should appear by their minutes that they had appointed a day to hear persons objecting to the improvement, or interested therein: it is sufficient if such notice of hearing, drawn in compliance with the provisions of the charter by order of the city council, be regularly advertised by the city clerk. *Ib.*

ESTATE TAIL.

See DEED.

ESTOPPEL.

See MUNICIPAL CORPORATIONS.
OFFICIAL BOND,
PLEAS AND PLEADING.

EVIDENCE.

1. A paper may be competent evidence of a fact stated in it, although invalid as an agreement to bind the party. *Ortley v. Chadwick*, 35
2. The statements of an agreement invalid for want of consideration may be competent, and may be proved by the paper. *Ib.*
3. In an action of trespass for assault and battery, evidence directly tending to show that the plaintiff had got up a false case to impose upon the jury is competent in mitigation of damages. *Wrege v. Westcott*, 213
4. A letter from the plaintiff to the father of the defendant, not containing a statement of any facts material to the controversy, and relating only to an offer of compromise, is not competent evidence. *Ib.*
5. This court will not weigh the evidence on a *certiorari*, and will not reverse, unless it appears that some principle of law has been violated. *Lyness v. Davis*, 301
6. If evidence be improperly admitted because a writing was not produced, this court will not reverse if the writing was afterwards given in evidence. *Ib.*
7. In a suit by the mother against the father for the support of their child,

- it is incompetent for the mother to prove that the father has made parol admissions that they have been divorced. *Tice v. Reeves*, 323
8. On an application for a *ca. sa.* under the statute, a statement, that defendant made certain representations to the plaintiff, which he, the plaintiff, had recently discovered were false, is not sufficient evidence that the debt was fraudulently contracted. *Bowme v. Titus et al.*, 340
9. The statements of the defendant when examined under the trustee act, cannot afterwards be sworn to as evidence of fraud, to procure a *ca. sa.* *Ib.*
10. The oath of a town clerk, that a certified copy of a resolution of a town meeting was copied from the town book, held to be lawful evidence. *The State, Fennimore, v. Clothier*, 351
11. To support an action upon a physician's bill, the plaintiff must prove that he has been duly licensed, or has a diploma, as prescribed by the act incorporating medical societies. *Dow v. Haley*, 354
12. Read, the defendant, leased to Barker and Barker, the plaintiffs, a mill and water power, and covenanted with them for the use of the water in as full and ample a manner as he enjoyed it. The plaintiffs alleging that the defendant had placed a trunk in the pond in such a manner as to carry off the water of a certain spring, which was one of the principal tributaries to the pond, brought suit to recover damages. *Held*, that the opinion of millers and millwrights, whether they be called experts or practical men, as to the quantity of grain the mill was capable of grinding and the value of the water for milling purposes, together with the statement of the methods used for measuring or weighing, was competent evidence. *Read v. Barker*, 378
13. On an application for the benefit of the insolvent laws, creditors may examine witnesses or offer evidence on the subject of the arrest of the debtor. *Bond v. Cox*, 381
13. Opposing creditors, or their counsel, have a right to propound interrogatories to the debtor in respect to his giving an inventory to the officer who arrested him, and it is the duty of the court to allow all interrogatories that are legal and pertinent. *Ib.*
15. Where a witness testifies that he has often seen the plaintiff write, and that he takes his signature to a receipt offered in evidence to be genuine, and the court admits the receipt to go to the jury, this is *prima facie* evidence of the genuineness of the receipt; and if, without any further evidence upon the subject, the jury regard the receipt as a forgery, the verdict will be set aside as contrary to the evidence. *Cook, Ex'r, v. Smith*, 387
16. The mere marking of a tax duplicate as an exhibit does not make it competent evidence of the contents; there must be some extrinsic proof of its genuineness. *State, Allen, v. Smith*, 449
17. A tax complained of as illegal will not be set aside as illegal, unless there is other proof of the facts necessary to show in what the illegality consisted, besides the prosecutor's *ex parte* affidavit upon which the *certiorari* was allowed. *Ib.*
18. If there be no latent ambiguity, the construction of a will must be drawn from the words, and parol testimony cannot be admitted to supply, contradict, enlarge, or vary the words, or to explain the intention of the testator. *Nevius v. Martin*, 465

See CONFESSION OF PRISONER.

EVIDENCE, CUMULATIVE.

See PRACTICE.

EXECUTION.

Where money raised by execution was brought into court for distribution, and claim made to it not only by the execution creditor, but by a landlord for the payment of

rent, and also by attaching creditors, it was *held*—

1. That to authorize payment to the landlord, it must appear that rent was due him upon such a lease or contract as would give him a right to distrain. *Kirkpatrick v. Cason*, 331
2. That where a jury, from the circumstances, would be authorized in finding that the landlord had relinquished his right of distress, the court is justified in denying his claim to any part of the money. *Ib.*
3. That where the property levied on was of less value than \$200, and no inventory or appraisement was made by the sheriff, as directed by law, but the property was suffered to remain in the hands of the defendant, and the execution creditor himself stayed all further proceedings on the execution, the goods were, by consent of the plaintiff, in defendant's possession for his use and that of his family, and not as agent or bailiff of the sheriff, and the sheriff had no further lien on them, and could not lawfully sell them under the execution. *Ib.*

FOREIGN CORPORATIONS.

Ferry boats owned by a foreign corporation, enrolled in the New York custom house, used for carrying freight and passengers between Jersey City and New York, and having no permanent location in Jersey City, are not liable to be taxed there; such property cannot be said to be situate in any township or ward. *The State v. Haight, Collector*, 428.

See CONSTITUTIONAL LAW.

FRAUD.

See PURCHASER.

INSOLVENT DEBTOR.

FRAUDULENT CONVEYANCE.

See INSOLVENT DEBTOR.

FRAUDS, STATUTE OF.

An agreement to sell and exchange a horse and money for a piece of land, is within the statute of frauds, and an action for damages for refusal to convey the land cannot be sustained on a verbal agreement. *Rutan v. Hinckman*, 255

GAMING.

Money bet on the result of a horse race, and deposited with a stakeholder, may be recovered back before the contract is executed. *Sutphin v. Crozer*, 257

GIFT.

1. Title to goods and chattels may pass by gift *inter vivos* when there is a delivery of the property. Mere delivery of the goods will not, in general, pass the title; there must be an intention to give accompanying the act of delivery in order to consummate the gift, or the circumstances attending the delivery of the goods must be such as ordinarily accompany a gift, inducing the donee to believe that a gift was intended. If that be the case, the title to the goods will pass, although it may not be the secret intention of the donors to make a gift. *Betts v. Francis*, 152
2. When a gift is completed by delivery and acceptance of the chattel, it is irrevocable. So long as there is no delivery and acceptance, it may be revoked. *Ib.*

GUARDIAN AND WARD.

1. By the term guardian, in the 6th section of the act of 1799, *Rev. Laws*, is meant such guardians as are named in the previous sections of the act. *Graham v. Houghton*, 553
2. A minor who is seized of a remainder in fee expectant upon the death of his father, who has a life estate therein, cannot be a ward in socage, nor can his father be his guardian in socage. *Ib.*

3. The father, who is guardian by nature only, and not appointed by any court or competent authority, is not a guardian within the meaning of the phrase "other guardian," named in the 3d section of the said act of 1799 respecting guardians. *Ib.*
4. A father, as guardian by nature, is not appointed; it results to him by operation of law. *Ib.*
5. A guardian by nature is guardian of the person only, and not of the estate. *Ib.*
2. When such a deed expresses on its face that the consideration was paid by the wife, the presumption is that the consideration was her own money. *Ib.*
3. The creditors of the husband, under judgment and execution against him upon a cause of action arising anterior to the deed, cannot get a title at law, as against the wife, so as to maintain ejectment against the husband and wife, nor turn her out of possession. The whole legal title remains in the wife by force of the statute, even if the consideration money of the deed was the property of the husband. *Ib.*
4. The earnings of the wife, upon express promise to pay her, belong to her, and not to her husband, until he does some act with intent to reduce them into possession; and if he dies first, they survive to the wife; and if with such proceeds she buys land, and the deed is made to her before the conversion by the husband, the land belongs to her, and cannot be seized and sold by his creditors under judgment against him. *Ib.*
5. The husband is not obliged to, nor is he guilty of any fraud against creditors, if he does not convert to his or their use the earnings of the wife. *Ib.*

HOBOKEN CITY CHARTER.

1. Ordinances of the mayor and common council of the city of Hoboken, prescribing the mode and time of running horse cars through the streets of said city by any corporation which has laid rails for the purpose of running horse cars thereon, and also that a license shall be first taken out under certain penalties therein mentioned, held invalid against the prosecutors, holding under their charter and also under anterior rights derived from the Bergen Turnpike Company, such company having the right to lay rails through the city without the consent of the city council. *The State, Hoboken and Weehawken Railroad Co., v. The Mayor, &c., of Hoboken,* 225
2. The supplement to the charter of the city of Hudson, of the 15th March, 1861, authorizing the common council to grant permission to any persons or corporation to lay railroad tracks through the streets, and run cars on them, under such licenses and conditions as the said council should think proper, and subject to be revoked at pleasure, held to be prospective, and not to affect existing rights. *Ib.*

See ORDINANCES.

HUSBAND AND WIFE.

1. Under the 3d section of the act of March, 1852, *Nix. Dig.* 503, for the better securing the property of married women, a married woman can receive to her sole use a deed for lands for a term of years. *Stall v. Fulton and Wife,* 430
2. Any place of public resort, in which illegal practices are habitually carried on, or when it becomes the habitual resort of thieves,

See WITNESSES.

INDICTMENT.

1. An indictment will lie for a nuisance in obstructing Hudson river, by placing vessels and wrecks on the shore between the high and low water lines, but not for placing them below the low water line. *State v. Babcock,* 29
2. The exclusive jurisdiction in and over the waters of the Hudson, and in and over the land covered by those waters, is in the state of New York, and not in the state of New Jersey. *Ib.*
3. Any place of public resort, in which illegal practices are habitually carried on, or when it becomes the habitual resort of thieves,

- drunkards, prostitutes, or other idle, vicious, and disorderly persons, who gather together there for the purpose of gratifying their own depraved appetites, or to make it a rendezvous where plans may be concocted for depredations upon society, and to disturb either its peace or its rights of property, is a public nuisance. *State v. Williams*, 103
4. No private individual has a right, for his own amusement or gain, to carry on a public business clearly injurious to and destructive of the public quiet, health, or morals, and is indictable for so doing, because the injury is of a public character, and not merely private to a single individual. *Ib.*
5. Violence and noise are not necessary constituents of a disorderly house; it is sufficient to show, under the general allegations, a house ill governed and disorderly, in the sense stated, to warrant a conviction. *Ib.*
6. Any person who keeps, or causes to be kept, for his own profit or amusement, or for any other cause, such a place of resort, or rents any building to any person, knowing that the same will be so kept, is guilty of an indictable misdemeanor. *Ib.*
7. To justify a conviction of a landlord, who rents to a tenant a place kept as a disorderly house, the evidence should clearly show that, at the time of leasing, the landlord knew the purposes for which, or the mode in which the house was to be kept. *Ib.*
8. The mere power of the landlord to expel his tenant, by summary proceedings, for nonpayment of rent according to the terms of the letting, although connected with the failure to avail himself of it when the house has been disorderly, does not of itself make him responsible. *Ib.*
9. Mere nonfeasance on the part of the landlord cannot involve him in the guilt of the tenant; but if he is active in advising the keeping of the house in a disorderly manner, or in aiding or assisting, or gives his consent and approbation to its being so kept, he becomes a participant in the act characterized by the criminal law as disorderly; but his sanction and consent ought not to be inferred from the mere fact of his non-interference with the conduct of his tenant, without some other acts or declarations on his part giving a decided character to his sanction and consent. *Ib.*
10. The sale of liquor on the Sabbath day is unlawful, and a practice of so keeping a house as to violate the law is to make it disorderly. *Ib.*
11. The inhabitants of counties were not indictable at common law for not repairing bridges over canals, but only bridges over rivers. *State v. Hudson county*, 137
12. The inhabitants of counties in this state are not indictable for not repairing bridges over rivers in this state. *Ib.*
13. On an indictment for rape, the defendant may be convicted of an assault, and found not guilty of the rape. *State v. Johnson*, 185
15. Under the laws of this state, a party indicted for a crime may be convicted of any offence of a lower degree, provided such lower offence is included within the description in the indictment, without regard to the question whether it was or was not technically a felony. *Ib.*
15. An indictment for stealing lead water-pipe, fixed to a paper mill, is indictable under the 66th section of the statute respecting crimes. *Nix. Dig.* 188. *State v. Stone*, 299
16. An indictment under the act of 1849, *Nix. Dig.* 193, § 103, for causing and procuring the miscarriage of a woman then pregnant with child, must charge that the defendant did the acts in the statute specified, with intent to cause and procure the miscarriage. Both words must be used conjunctively, in order to charge in the indictment the intent which the statute makes criminal. *State v. Drake*, 422
17. A charge in the indictment, that the defendant administered a certain poison, or drug, or medicine, or noxious thing, is bad, because it does not charge that he administered the whole of the prohibited things, nor any one of them. *Ib.*

INSOLVENT DEBTOR.

1. A debtor under bond, usually called an insolvent bond, need not surrender, and be placed in close confinement before the filing of an undertaking by a creditor. Until the Court of Common Pleas, for some reason, make a final decision in the matter, the debtor is not bound to surrender himself into custody. *Doremus v. Bush*, 85
2. That part of the sixth section of the act in regard to insolvent debtors (*Nix. Dig.* 378), which requires the debtor's conduct to be fair, upright, and just, must be restricted to his conduct in making his account and inventory, and in delivering up to his creditors all his estate, and does not apply to the conduct of the debtor in contracting his debt. *Reford v. Cramer*, 250
3. If the debtor has made a conveyance of his real property to his wife, although before the debts were contracted, it is a question for the jury whether such conveyance was made with intention to defraud his creditors. Such conveyance is not *per se* fraudulent and void; yet, if not made *bona fide* and for the benefit of the wife, but with a fraudulent intent, it comes within the provision of the tenth section of the insolvent act, and is a good bar to the defendant's discharge. *Ib.*

See PRACTICE, 15, 16.

JERSEY CITY CHARTER.

Under the charter of Jersey City, only such resolutions and ordinances of the common council as are in their nature final need be presented to the mayor for approval; when a final ordinance provides for a different improvement from that asked for in the petition presented to the council, and specified in the public notice given according to the charter, it will be set aside and held void as against the prosecutors. *State, Howheth, v. Jersey City*, 93

See ASSESSMENT.

WATER COMMISSIONERS.

JOINT AND SEVERAL.

If one of three makers of a joint and several promissory note die, the contract of the surviving makers remains joint as well as several, and payment of interest within six years by one of the surviving makers will take the case out of the statute of limitations. *Corlies v. Fleming*, 349

See JUDGMENT, 2.

JUDGMENT.

1. Upon the application to cancel a judgment in this court, on the ground that certain bonds, to which the defendants alleged the judgment was collateral, had been paid and satisfied by the acceptance of other bonds of a like amount, the court will not interfere where it appears that the original bonds were collateral to the judgment, and that the new bonds were, by agreement, substitutions for those first given. By such agreement, the defendants are estopped from denying that the judgment was merely collateral. *Coulter v. Kaighn*, 98
2. It seems that the representatives of one of the defendants in a joint judgment who has died may be sued, although the other defendant is living. *Parker v. Thompson*, 311
3. The judgment against executors of their own wrong should be special and not general. *Ib.*

JURISDICTION.

1. An indictment will lie for a nuisance in obstructing Hudson river, by placing vessels and wrecks on the shore between the high and low water lines, but not for placing them below the low water line. *State v. Babcock*, 29
2. The exclusive jurisdiction in and over the water of the Hudson, and in and over the land covered by those waters, is in the state of New York and not in the state of New Jersey. *Ib.*
3. The tribunal of the commissioners

of appeal is a special tribunal, and it is well settled that such tribunals should show, upon the face of the proceedings, all facts necessary to give jurisdiction. *Nixon v. Rapple*, 58

4. Where a city charter authorizes street improvements to be made, or work done, only on the application in writing to the council, of a majority of the resident owners of property lying along such street, it should appear in the return to the *certiorari* bringing up for review the proceedings of the city council, that the application is signed by a majority of the resident owners; the burthen of proof is on the defendants, and such fact, being a jurisdictional one, must appear on the face of their proceedings. *State v. Woodruff*, v. *City Council of Elizabeth*, 176
5. On an application for the benefit of the insolvent laws, in order to give the board jurisdiction of such application, the debtor, at the time of giving bond, should be under arrest or held in custody. *Bond v. Coe*, 381
6. The proceedings of surveyors of the highways in vacating part of a street which had been dedicated to public use, but never recognized as a public highway by lawful authority, held to be void. (See 1 *Bensley* 299, *Holmes v. Jersey City*. The Court of Common Pleas cannot appoint surveyors to vacate a mere act of dedication. *Mayer & Co. v. Jersey City v. State*, *Housh*, 521

See DEED, 10, 11.

LAMBERTVILLE CHARTER.

See STATUTE, CONSTRUCTION OF, 2, 3, 4.

LANDLORD AND TENANT.

See EXECUTION, 1, 2.
INDICTMENT, 5, 6, 7.

LEGACY.

When the absolute property in a fund is bequeathed in fractional

interests in succession, at periods which must arrive, the interest of the first and subsequent takers will vest together. *Green v. Howell*, 327

LIMITATIONS, STATUTE OF.

If one of three makers of a joint and several promissory note die, the contract of the surviving makers remains joint as well as several, and payment of interest within six years by one of the surviving makers will take the case out of the statute of limitations. *Corlies v. Fleming*, 349

LIEN LAW.

1. The vessel lien law of this state applies as well to foreign as to domestic vessels. *Randall v. Roche*, 220
2. A lien for supplies furnished to a foreign vessel, on the credit of one of the owners or the master, does not create a maritime lien on the vessel within the jurisdiction of the United States courts of admiralty, and may be enforced in the courts of this state. *Ib.*

MANDAMUS.

1. When a proper remedy. *Callahan v. Township of Morris*, 174
2. Attachments for not obeying a *mandamus* to open a road served on the overseer after he went out of office, and on the new overseer, refused. *State v. Elkinton*, 335
3. *Mandamus* to open a road ought to be, in the first instance, an alternative writ, and not peremptory, and how obtained. *Ib.*
4. The writ should be delivered or shown to the person to whom it is directed. *Ib.*
5. Overseer of the highway is bound to open and work the road without regard to the orders of the town meeting or the township committee. *Ib.*

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. A master is liable to answer in a civil suit for the tortious acts of his servant, if the act be done in the course of his employment in his master's service, or within the scope of his authority; whether so done or not, must depend upon the facts of each particular case. *Ayrerigg's ex'rs v. The New York and Erie Railroad Company*, 460
2. What acts of the captain of a ferry boat may be considered as not being in the course of his employment. *Ib.*

MORTGAGE.

See DEED, 6.

MUNICIPAL CORPORATION.

1. The powers of a municipal corporation are derived from its charter. It cannot, without express authority from the charter, create an office, define its duties, appoint an incumbent, and clothe him with the powers of a municipal officer. *Mayor, &c., of Hoboken v. Harrison*, 73
2. Where an officer of a municipal corporation gives his official bond with sureties, which bond recites that he has been appointed "collector of assessments for street improvements," with condition that "he should well and truly pay to the treasurer of said city all moneys which he might collect or receive as such collector as aforesaid," &c., the sureties are estopped from denying that such officer was *de facto* a collector of assessments for street improvements and their liability to pay over what he has collected is co-extensive with his liability. *Ib.*
3. The fact that bonds are not prescribed by law does not necessarily invalidate them, although given by a public officer as security for the discharge of his duties, if they are not unlawfully exacted of him; if voluntarily given, they are binding upon the parties to them. *Ib.*
4. On petition to a municipal authority, asking that a street may

be paved, the city council may regulate the surface of the street, by filling and excavating it, preparatory to paving it, and include, as a necessary incident, the costs of such grading in the assessment for the costs of paving. *The State, Hand, v. City Council of Elizabeth*, 365

5. Assessments for the paving of intersections, under the charter of the city of Elizabeth, must be confined to the line of the street on which the improvement is applied for. *Ib.*
6. An incorporated city has jurisdiction over a turnpike road constructed within the limits of the city, for the purpose of regulating, grading, and paving it, but has no right to regulate and grade the street so as to injure the turnpike company, or to interfere with their chartered rights; for police purposes, it has authority to make such municipal regulations as it may deem expedient. *State, Parker, v. Mayor, &c., of New Brunswick*, 395

NEW TRIAL.

New trial applied for on the ground that a witness for the defendant made statements in the hearing of some of the jury which might have influenced the verdict, but refused, as it appeared that there was no evil intention, that the defendant had no concern in the transaction, and that the verdict was satisfactory to the court. *Jones v. Vail*, 135

See PRACTICE.

NONSUIT.

See PRACTICE.

NOTICE OF PROTEST.

See PROMISSORY NOTES.

NUISANCE.

See INDICTMENT, 1, 3, 4, 5.

OFFICIAL BONDS.

1. Where an officer of a municipal corporation gives his official bond with sureties, which bond recites that he has been appointed "collector of assessments for street improvements," with condition that "he should well and truly pay to the treasurer of said city all moneys which he might collect or receive as such collector as aforesaid," &c., the sureties are estopped from denying that such officer was *de facto* a collector of assessments for street improvements, and their liability to pay over what he has collected is co-extensive with his liability. *Hoboken v. Harrison*, 73
2. The fact that bonds are not prescribed by law does not necessarily invalidate them, although given by a public officer as security for the discharge of his duties, if they are not unlawfully exacted of him; if voluntarily given, they are binding upon the parties to them. *Ib.*
3. A bond by an executor or administrator, to the Ordinary, which varies from the form prescribed by the statute, if voluntarily given, and not made void by the statute, is good. *Ordinary v. Cooley*, 179

ORDINANCES.

1. Under the charter of Jersey City, only such resolutions and ordinances of the common council as are in their nature final need be presented to the mayor for approval; when a final ordinance provides for a different improvement from that asked for in the petition presented to the council, and specified in the public notice given according to the charter, it will be set aside and held void as against the prosecutors. *State, Heweth, v. Mayor of Jersey City*, 93
2. Ordinances of the mayor and common council of the city of Hoboken, prescribing the mode and times of running horse cars through the streets of said city by any corporation which has laid rails for the purpose of running horse cars

thereon, and also that a license shall be first taken out under certain penalties therein mentioned, *held* invalid against the prosecutors, holding under their charter and also under anterior rights derived from the Bergen Turnpike Company, such company having the right to lay rails through the city without the consent of the city council. *State, Hoboken Railroad Co., v. Mayor, &c., of Hoboken*, 225

3. The charter of the city of Newark requires certain ordinances to be published for a certain time, and in a certain manner, between their second and third readings. Such an ordinance, having been read a second time, and ordered to a third reading, was reconsidered and taken up, and the vote of the last meeting ordering it to a third reading reconsidered, and a section of the ordinance materially amended. It was then, at the same sitting, ordered to a third reading, and finally passed; *held*, that when the vote ordering it to a third reading was reconsidered, and the proposed ordinance put again upon its second reading, it could not be lawfully read again without the notice required by the charter. *State, Doyle, v. Mayor, &c., of Newark*, 303
4. If an ordinance requires a street to be properly regulated and graded, &c., without any fixed grade being established, and afterwards provides that the work be done under the superintendence of the city paver, or other person appointed by the common council, and this is in accordance with the terms of the charter, it is sufficient. *State, Parker, v. Mayor, &c., of New Brunswick*, 395

ORPHANS COURT.

See GUARDIAN AND WARD.
DEED.

OVERSEERS OF HIGHWAYS.

1. The township committee have no power to authorize an overseer of roads to expend money for their repair, so as to render the township liable to an action. *Callahan v. The Township of Morris*, 160

2. Roads must be opened or worked for cash or upon the credit of the overseer; or if the overseer is not furnished with money, he may warn out the inhabitants to work without pay. *Ib.*
3. The township committee are authorized to apportion the money raised for road purposes among the several districts; but they ought not to make the apportionment, and newly assign to the overseers their respective divisions until twenty days after the town meeting; so that it may be known what taxpayers have given notice that they will work out their road tax. *Ib.*
4. Attachment for not obeying a *mandamus* to open a road served on the overseer of the highways after he went out of office, and on the new overseer, his successor, refused. *The State v. Elkinton*, 335
5. The writ of *mandamus* to open a road should be delivered or shown to the person to whom it is directed. *Ib.*
6. The overseer of the highway is bound to open and work the road without regard to the orders of the town meeting or the township committee. *Ib.*

PARTNERSHIP.

A firm in the country was dissolved in 1849, and no notice of dissolution given. In 1860 one of the partners drew a note, and signed to it the name of the firm without the knowledge or consent of the other partner, and such paper was discounted by a bank in Philadelphia without inquiry. *Held*, that such note was not binding on the firm. *Farmers & Mechanics Bank v. Green*, 316

PHYSICIAN'S BILL.

To support an action upon a physician's bill, the plaintiff must prove that he has been duly licensed or has a diploma, as prescribed by the act incorporating medical societies. *Dow v. Haley*, 354

See ACTION.

PLANK ROAD.

1. A plank road company is in fact a turnpike company within the meaning of the tax law of 1854, (*Nix. Dig.* 851, § 64,) requiring "the personal estate of such company to be assessed in the township or ward in which the treasurer or other officer authorized to discharge the general pecuniary obligations of such company resides." *The State, Jersey City, &c., Plank Road Co. v. Haight*, 443
2. A plank road constructed by a private company and under legislative authority, and dedicated to public travel, with gates erected thereon for the collection of tolls, as a condition of such travel, may properly be termed a turnpike road, without regard to the material of which the surface of the road may be composed. *Ib.*

See TAXATION.

PLEAS AND PLEADING.

1. In an action of trespass *quare clausum fregit* before a justice of the peace, the defendant pleaded title and a right of way over the close in question. Upon such suit being brought in this court, the defendant filed six pleas. On motion to strike out pleas, it was *Held*, that the first plea of not guilty, not being the same plea as that pleaded before the justice, must be stricken out; that the second plea of *liberum tenementum* is correct; that the fourth plea, that the *locus in quo* was a public highway, is not a plea of title, and is not good; that the third and fifth pleas, setting up a right of private way by prescription, and a right of private way by grant, if wrong, may be demurred to, but cannot be stricken out on motion; and that the sixth plea, that the *locus in quo* was a by-way, and that it had been opened by three of the chosen freeholders, does not amount to a plea of title, and must be stricken out. *Brain v. Snyder*, 57
2. Customs and usages in derogation of the common law must be strictly

- pleaded, and when well pleaded, the count must show a case clearly within the usage. *Overman v. Hoboken City Bank*, 61
3. In an action for a penalty for the violation of a city ordinance, which declares that it shall not be lawful for any person to burn tan in propelling machinery, or for any other purpose, to the annoyance and discomfort of any person or persons residing in his or their vicinity; and if he does, and shall not immediately desist, upon the request of any citizen annoyed thereby, or shall be guilty of any subsequent violation of such ordinance, he shall be liable to a fine, &c., it is necessary to allege in the state of demand a burning after a request to desist, and the names of the persons who were annoyed. *Tyler v. Lawson*, 120
 4. A declaration alleged, that whereas the defendant, by a certain bond, did recite that he held a bond and mortgage given by J. A. S. to him, as trustee, to be appropriated by the defendant to the support of one M. S. during her life, and to pay the residue that might remain in his hands to the plaintiff.
Held that a plea averring that the land covered by the mortgage has been sold, and all its proceeds absorbed by prior encumbrances, was a good defence. *Staats v. Bergen*, 131
 5. A bond, by an executor or administrator, to the Ordinary of the state, which varies from the form prescribed by the statute, if voluntarily given, and not made void by statute, is good; and when, by the condition of such bond, the executor or administrator is required to render a just and true account concerning the sale of property, an assignment of a breach of such condition, that he had not rendered a just and true account of his administration of the moneys arising from the sale, is bad on demurrer. *Ordinary v. Conley*, 179
 6. In an action of trespass in a justice's court, a plea that there was a road across the *locus in quo*, to which the defendants had a title in common with all other citizens of this state, and that they entered within the limits of this road, is not a plea of title to any real estate. Such plea means nothing more than that the defendants had right, in common with all citizens, to a road across the *locus in quo*, which is merely a right of highway. *Yauger v. Manning*, 182
 7. The defendants tendering the plea as a plea of title, are not thereby estopped from denying that it was such plea, unless on the ground of wilful misrepresentation by defendants, on which the plaintiff was induced to act to his injury. *Ib.*
 8. To a suit on a judgment in New York, the plea of *nil debet* is the general issue. *Beale v. Berryman*, 216
 9. Under our statutes of 1799, *Nir. Dig.* 681, § 2, and of March 8th, 1852, *Nir. Dig.* 681, it is regular in such suit to plead *nil debet*, and give notice that no summons had been served in New York; and judgment signed, as for want of a plea, will be set aside with costs. *Ib.*
 10. One of the conditions of an ordinary administration bond is, that the administrator will pay over to the persons entitled all the residue of the goods and chattels found remaining upon the account of the administrator. *Held*, that it is no breach of this condition that the administrator has or has not paid over to the creditors their *pro rata* share ordered to be paid to them by the Orphans' Court, and that the remedy of the creditors is under the other conditions of the bond. *Ordinary v. Conley*, 271
 11. The history and origin of the different conditions of the administrators' bond commented upon. *Ib.*
 12. A state of demand against a beneficial society claiming a balance alleged to be due during the plaintiff's sickness, at the rate of three dollars per week, "the sum paid by said society to the sick of said society," *held*, not to contain a legal cause of action. *Beneficial Society, &c. v. White*, 313
- PLEA OF TITLE.
- See PLEAS AND PLEADING, 1, 6, 7.

PRACTICE.

1. When, upon the trial day, the defendant moves to nonsuit the plaintiff because the costs of two former suits for the same cause of action have not been paid, and the defendant offers to pay the costs forthwith, and the defendant is not prepared with his bills of costs or to show the amount of costs due, he is not entitled to a judgment of nonsuit. *Janeway v. Skerritt*, 97
2. To a suit on a judgment in New York, the plea of *nil debet* is the general issue. *Beale v. Berryman*, 216
3. Under our statutes of 1799, *Nix. Dig.* 681, § 2, and of March 6th 1852, *Nix. Dig.* 681, it is regular in such suit to plead *nil debet*, and give notice that no summons had been served in New York; and judgment signed as for want of a plea, will be set aside with costs. *Ib.*
4. Service of a notice of trial at the office of the attorney, who was absent in Europe, and on the plaintiff, also, held good. *Harwood v. Smethurst*, 230
5. The defendant noticed for trial an action of replevin; the plaintiff not appearing, a verdict was taken for defendant. Held irregular, and verdict set aside. A nonsuit should have been entered, and the damages then assessed. *Ib.*
6. An *ex parte* affidavit allowed to be read on the motion to set aside verdict. *Ib.*
7. In an action on a constable's bond, a rule for the assessment of damages in open court or for a writ of inquiry, under the practice act and supplements, is not authorized. *Mayor, &c., of Jersey City v. Chase et al.*, 233
8. If neither party applies for an assessment of the damages by a jury, the court will assess them; if either party does so apply, a writ of inquiry will be awarded, which in this case was ordered to be executed before a judge at the circuit. *Ib.*
9. If damages are claimed for a person other than the original prosecutor, upon a special notice, before the writ issues, the damages sustained by him will be ordered to be assessed by the same jury. *Ib.*
10. A *certiorari* for the purpose of removing an assessment, brought within a reasonable time after the assessment was ratified and confirmed, will not be dismissed because the ordinance which is thus brought incidentally in question was passed a long time previous. *The State, Doyle, &c., v. Mayor, &c., of Newark*, 303
11. A *ca. sc.* cannot be issued pending proceedings under the act to prevent fraudulent trusts and assignments. *Bowne v. Titus, &c.*, 340
12. It is not sufficient for the commissioner to decide that there was proof, to his satisfaction, that the defendant had rights or credits, moneys or effects, either in his own possession, or in the possession of some other persons; in the words of the act, he should specify by means of which of the several things mentioned, the fraud was committed. *Ib.*
13. If a plaintiff, who becomes entitled to a judgment by default in vacation, omits to enter the same until after the term next after such default, he cannot have such judgment until he has given thirty days' notice to the defendant. *Slack v. Reeder*, 348
14. When a witness, who has been in attendance during the progress of a trial, fails to appear when called, the court will not reverse a judgment for that cause, no motion having been made to postpone the case or procure the testimony of the witness *de bene esse*; and especially when it appears that the evidence of the witness, had he been present, would have been only cumulative. *Read v. Barker*, 378
15. On an application for the benefit of the insolvent laws, creditors may examine witnesses or offer evidence on the subject of the arrest of the debtor. *Bond et al. v. Cox*, 381
16. Opposing creditors, or their counsel, have a right to propound interrogatories to the debtor in respect to his giving an inventory to the officer who arrested him, and it is the duty of the court to allow

all interrogatories that are legal and pertinent. *Ib.*

See CAPIAS AD SATISFACIENDUM.
CERTIORARI.

PRESUMPTION.

When an exception is general as to the law upon a particular part of the judge's charge, and the assignment is also general, all the testimony necessary to support the legal proposition will be presumed to have been before the jury. *Perine v. Serrell*, 454

PRIVATE CORPORATION.

See ASSESSMENT.
TAXATION.

PROCURING MISCARRIAGE.

See INDICTMENT, 15, 16.

PROMISSORY NOTES.

1. A firm in the country was dissolved in 1849, and no notice of dissolution given. In 1860, one of the partners drew a note, and signed to it the name of the firm without the knowledge or consent of the other partner, and such paper was discounted by a bank in Philadelphia without inquiry. *Held*, that such note was not binding on the firm. *Farmers and Mechanics Bank v. Green*, 316
2. If one of three makers of a joint and several promissory note die, the contract of the surviving makers remains joint as well as several, and payment of interest within six years by one of the surviving makers will take the case out of the statute of limitations. *Cortice v. Fleming*, 449

PURCHASER.

An innocent purchaser of property, who has bought it in a fair *bona fide* manner at a fair price, cannot

be deprived of it because the object of the seller was to defraud his creditors.—By *ELMER, J. Farrell v. Colwell*, 123

RAILROADS.

1. When a railroad company is sued for damages sustained by a collision on their road, induced by the negligence of the company or their agents, and it appears that the party injured was himself guilty of such negligence or want of reasonable care as contributed to the doing of the injury, there can be no recovery. *Telfer v. Northern Railroad Company*, 188
2. "In crossing ordinary roads, caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads, it is exacted to avoid being run over yourself. In the former case the blame attaches *prima facie* to the party doing the injury; in the latter, it attaches, in the first instance, to the party obstructing the track."—*Per VAN DYKE, J.* *Ib.*
3. In an action under the statute to recover damages for death caused by negligence, only the pecuniary loss or injury sustained by the plaintiff can be allowed; and in estimating that the chances of health and life are to be considered in connection with the value of services. *Ib.*
4. The reciprocal duties of railway companies and persons crossing their roads discussed. *Ib.*
5. A railroad company, furnishing their own conveyances, carrying nothing but passengers, and charging a certain price as fare, cannot be considered a toll collecting company. *The State, Jersey City, v. Haight*, 447
6. The personal property of such company should be taxed in the township or ward where the principal business of such company is transacted. *Ib.*

RAILROAD CHARTER.

1. The charter of the Morris and Essex Railroad Company subjects the

company to a tax of one and a half per cent. on the cost of the road, as soon as the net proceeds shall equal seven per cent., and provides that no other tax shall be levied upon the company. By the terms of the charter, it may be altered or repealed by the legislature. The subsequent general tax law of 1862 subjected to taxation the real estate of all private corporations, "except those which by virtue of any irrevocable contract in their charters or other contracts with the state are expressly exempt from taxation," and it repealed all acts, whether special or local, inconsistent with its provisions. *Held*, that the tax law of 1862 repealed the provision of the charter in regard to taxation, and that the assessment made upon the real estate of the company in the township of Morris was rightfully made under the general law. *State, Morris and Essex Railroad, v. Miller*, 368

2. No "irrevocable contract" can result from provisions in a charter which is made, in terms, subject to alteration, amendment, or repeal by the power granting it. *Ib.*
3. Where the right to alter or amend a charter, whenever the public good may require, is reserved, the legislature is the proper tribunal to determine when the right shall be exercised. *Ib.*

RAPE.

See INDICTMENT, 12, 13.

RENT.

See EXECUTION.

REMAINDER.

See DEED, 9, 10.

ROADS.

1. Where a turnpike road has been abandoned for many years by the company which built it, and has been used by the public as an ordinary highway, and repaired at the public expense, it becomes sub-

ject to the laws concerning roads, and the surveyors of the highways have power to vacate it. *The State, Snedeker, v. Snedeker*, 80

2. A plaintiff in *certiorari* cannot, unless holding the rights of the turnpike corporation, assign, as a reason for setting aside the action of the surveyors, that it is in violation of the rights of the company. *Ib.*
3. Every citizen is interested, more or less, in every highway, and has a right to submit any questions affecting such interests to the court. *Ib.*

See TOWNSHIP COMMITTEE.
MANDAMUS.

SURVEYORS OF HIGHWAYS.

SABBATH.

The sale of liquor on the Sabbath day is unlawful, and a practice of so keeping a house as to violate the law, is to make it disorderly. *State v. Williams*, 102

SCHOOL LAW.

1. The act of March 27th, 1862, (*Laws* 1862, 307,) is not a supplement to the act of March 14th, 1851, (*Laws* 1851, 260, § 11,) but a distinct and independent act, and does not, in order to raise the necessary money by taxation, require a resolution of two-thirds of the inhabitants present at the meeting of the taxable inhabitants of the district, or the certificate of the school trustees to be under oath. *The State, Van Riper, v. Ryerson*, 268
2. On a *certiorari* to set aside an assessment imposed by a meeting of the taxable inhabitants of a school district, (*Nix. Dig.* 780) the court will not decide the legal existence of such corporation, or the legality of the election or appointment of the persons who acted as trustees to incorporate the district. *The State, Winsor, v. Donahay*, 504
3. The certificate of the trustees of the proceedings of a meeting to order money to be raised by taxa-

tion, need not set forth the places at which the notices of the meeting were set up; if in the words of the act, "in at least three public places in said district," it is sufficient. *Ib.*

STATE BONDS.

See TAXATION, 1, 4.

STATE JURISDICTION.

The exclusive jurisdiction in and over the waters of the Hudson, and in and over the lands covered by those waters, is in the state of New York, and not in the state of New Jersey. *The State v. Babcock*, 29

STATUTES, CONSTRUCTION OF.

1. Whether a general law repeals any of the provisions of a special charter, is a question of legislative intention. If the words of repeal are so strong as to admit of no doubt as to the intention to repeal they shall take effect. *Mechanics and Traders Bank v. Bridges*, 112
2. The first section of the act of March 17th, 1858, in regard to damages to property in cases of the alteration of the grades of streets or highways (*Niz. Dig.* 752), applies to the alteration of a grade not before formally established. *Inhabitants of Lambertville v. Cleringer*, 53
3. The charter of Lambertville provides that the common council shall not alter the grade of any street which has been built upon and which has been fixed by lawful authority, unless by the consent of the owners of a majority of the lots, &c.; *held*, that this provision applies only to the altering of a grade previously fixed by lawful authority. *Ib.*
4. In such action the defendants not permitted to deduct from the amount of damages sustained by the plaintiff the amount of benefits derived by him from the improvement of the street. The land owner is entitled to the benefit which he

derives, in common with other property holders on the street, by the making of the improvement, and the benefit he receives in common with others cannot be deducted from his damages. *Ib.*

See DAMAGES.

RAILROAD CHARTERS, 1, 2, 3.

STEALING LEAD FROM BUILDINGS.

See INDICTMENT, 14.

SURVEYORS OF HIGHWAYS.

1. The proceedings of surveyors of the highways in vacating part of a street which had been dedicated to public use, but never recognized as a public highway by lawful authority, held to be void. (See 1 *Beasley* 299, *Holmes v. Jersey City*.) The Court of Common Pleas cannot appoint surveyors to vacate a mere act of dedication. *The Mayor, &c., v. The State, Howeth*, 521
2. Under the 2d section of the act concerning roads, *Niz. Dig.* 737, the courts of Common Pleas and Supreme Court are bound, as a legal necessity, to appoint the surveyors of the township through which the road is to run, unless it is to run through their lands, or unless the court, for some other reason in the exercise of a sound discretion, shall think they ought not to be appointed. *Parsells et al. v. The State, Mann et al.*, 530
3. The simple fact, that the surveyors are taxpayers in the township, is not sufficient to exclude them, or to warrant the courts in refusing to appoint them. The supplement of 1850, making the townships liable to pay for lands taken for roads, furnishes no ground in itself to which the discretion of the courts can be applied. It may be an element, among other reasons, which, taken together, the court may deem sufficient to exclude the surveyors from appointment. *Ib.*
4. The Court of Common Pleas, having exercised their discretion in the matter of appointment, and

having so certified in their order, it is not the subject matter of review in the Supreme Court. *Ib.*

5. If the grounds for exclusion can be inquired into, the court below must be called on to certify the facts in regard to them, before the testimony of witnesses can be resorted to. The evidence of one of the judges who made the order, is insufficient to contradict the language made use of by the whole court on the face of the order of appointment. *Ib.*

TAXATION.

1. The bonds issued by this state under the act of 1861 (*Laws 1861, p. 654*.) are exempt from taxation when held by individuals or corporations. *Newark City Bank v. Assessor*, 1
2. The stocks and securities issued by the United States under the power to borrow money are exempt from state taxation in the hands of individuals or corporations. *Ib.*
3. Stocks in foreign corporations, held by individuals resident in this state, are personal estate within this state, and subject to taxation. *Ib.*
4. Corporations are entitled to have deducted from the amount of their capital stock paid in, and accumulated surplus, the amount of the bonds of this state and the stock and public securities issued by the United States owned by them at the time of assessment. *Ib.*
5. Under the tax law of 1862, a resident of Jersey City is liable to taxation for stocks in foreign corporations held by him. *Merchants and Traders Bank v. Bridges, &c.*, 112
6. The tax law of 1862, repeals so much of the charter of Jersey City, passed in 1851, as regulates the things and property made taxable, but does not repeal the mode of levying and-collecting the tax by the officers appointed under the charter and its supplements. *Ib.*
7. A farm lying in two townships, upon which there was a dwelling house situate in each of said townships, one of which was occupied by the owner, and the other by his son, who tilled the farm upon shares, held to be all occupied by the owner, and to be rightfully taxed to him in the township wherein he resided. *The State, Apgar v. Hoffman*, 346
8. It seems that the act to make taxes a lien on real estate, *Nix. Dig. 853, § 33*, is only directory, and is indispensable only for the purpose of authorizing a sale of the land when the owner is a nonresident. *Ib.*
9. A tax voted by a special town meeting to pay bounties to volunteers, unauthorized by any special law, where the notice of the meeting did not specify the object, and no specific sum, nor any certain means of ascertaining the proper amount were determined, held to be illegal. *State, Fennimore, v. Clothier*, 351
10. The town clerk's oath, that a certified copy of a resolution of the town meeting was copied from the town book, held to be sufficient. *Ib.*
11. A tax illegally assessed will be reversed and set aside when regularly before the court on a *certiorari*, although it has been collected by warrant. *Ib.*
12. The charter of the Morris and Essex Railroad Company subjects the company to a tax of one and a half per cent. on the cost of the road, as soon as the net proceeds shall equal seven per cent., and provides that no other tax shall be levied upon the company. By the terms of the charter, it may be altered or repealed by the legislature. The subsequent general tax law of 1862 subjected to taxation the real estate of all private corporations, "except those which by virtue of any irrevocable contract in their charters or other contracts with the state are expressly exempt from taxation," and it repealed all acts, whether special or local, inconsistent with its provisions. Held, that the tax law of 1862 repealed the provision of the charter in regard to taxation, and that the assessment made upon the real estate of the company in the township of Morris was rightfully made under

- the general law. *The State, Morris and Essex Railroad Company v. Miller*, 368
13. No "irrepealable contract" can result from provisions in a charter which is made, in terms, subject to alteration, amendment, or repeal by the power granting it. *Ib.*
14. Where the right to alter or amend a charter, whenever the public good may require, is reserved, the legislature is the proper tribunal to determine when the right shall be exercised. *Ib.*
15. Ferry boats, owned by a foreign corporation, enrolled in New York custom house, used for carrying freight and passengers between Jersey City and New York, and having no permanent location in Jersey City, are not liable to be taxed there; such property cannot be said to be *situate* in any township or ward. *The State, New York and Erie Railway Company, v. Haight*, 428
16. A plank road company is in fact, a turnpike company within the meaning of the tax law of 1854, (*Niz. Dig.* 851, § 94,) requiring the personal estate of such company to be assessed in the township or ward in which the treasurer or other officer authorized to discharge the general pecuniary obligations of such company resides." *The State, Jersey City &c., v. Haight*, 443
17. A railroad company, furnishing their own conveyances, carrying nothing but passengers, and charging a certain price as fare, cannot be considered a toll collecting company. *The State, Jersey City and Bergen Railroad Co., v. Haight*, 443
18. The 12th section of the tax law of 1862 repeals those parts of the act of 1854 which relate to mortgages, so that all personal estate, including all debts secured by mortgage, is to be taxed. *State, Same, v. Johnson*, 452
19. To entitle a taxpayer to have the debts he owes deducted, he must have an affidavit made out and delivered to the assessor before the time limited by law for closing the assessment roll. The assessor is not bound to do it for him. If neglected, the commissioners of ap-
 peal may waive it, and make the deduction; but if they decline to do so, the court will not set aside the tax. *Ib.*
20. A law laying a special tax on the business of foreign corporations, regularly doing business in this state, transporting passengers and merchandise across the state, from and to foreign states, such tax being graduated by the number of the passengers and the weight of the goods carried, is not an infringement of that clause of the constitution of the United States which gives to congress the power to regulate commerce among the several states. *The State v. Delaware, &c., R. R. Co.*, 473
21. Such commerce is not of such a national character, that a state may not regulate it in the manner complained of, without violating the constitution of the United States. *Ib.*
22. Such tax is merely a tax upon the company, in proportion to the number of passengers and weight of merchandise transported by them within this state, and not a regulation of commerce among the states. *Ib.*
23. A foreign corporation, upon which has been conferred by the legislature of this state the power to purchase and hold lands in this state, does not, by reason of such legislative action, lose its foreign, and acquire a domestic character. A corporation can be properly said to exist only in the state which created it. *Ib.*

TAX LAW OF 1862.

24. Under the act of 1862, private corporations must be assessed at the full and actual value of their capital stock, and not on the full amount of their capital stock paid in. *The State, Gloucester Manuf'g Co., v. Hallam*, 405
25. The provisions of several conflicting sections of the bill discussed. *Ib.*

TOWNSHIP COMMITTEE.

1. The township committee have no

- power to authorize an overseer of roads to expend money for their repair, so as to render the township liable to an action. *Callahan v. Inhabitants of Morris*, 160
2. Roads must be opened or worked for cash or upon the credit of the overseer; or if the overseer is not furnished with money, he may warn out the inhabitants to work without pay. *Ib.*
 3. The township committee are authorized to apportion the money raised for road purposes among the several districts; but they ought not to make the apportionment and newly assign to the overseers their respective divisions until twenty days after the town meeting: so that it may be known what taxpayers have given notice that they will work out their road tax. *Ib.*
 4. The committee ought to keep a record of their proceedings, and make all their orders in writing. *Ib.*

See MANDAMUS, 5.

TURNPIKE ROAD.

Where a turnpike road has been abandoned for many years by the company which built it, and has been used by the public as an ordinary highway, and repaired at the public expense, it becomes subject to the laws concerning roads, and the surveyors of the highways have power to vacate it. *The State, Snedeker, v. Snedeker*, 80

See PLANK ROAD, 1, 2.

UNITED STATES BONDS.

See TAXATION, 2, 4.

VERDICT.

Where a witness testifies that he has often seen the plaintiff write, and that he takes his signature to a receipt offered in evidence to be genuine, and the court admits the receipt to go to the jury, this is *prima facie* evidence of the genuineness

of the receipt; and if, without any further evidence upon the subject, the jury regard the receipt as a forgery, the verdict will be set aside as contrary to the evidence. *Cook, ex'r, v. Smith*, 387

VESSELS.

See LIEN LAW.

WARRANTY.

Under a warranty that a horse is sound and kind, and that if he should not suit, the seller would take him back, and send the purchaser another, *held* that the warranty as to unsoundness was independent, and that the right to provide another horse under the contract did not extend to unsoundness; that the horse being unsound, and having died, the purchaser could recover damages, and was not obliged to call upon the seller to furnish another horse. *Perrine v. Serrell*, 454

See DAMAGES.

WATER COMMISSIONERS, JERSEY CITY.

1. The water commissioners of Jersey City are authorized to execute the plan of sewerage adopted by them, "with such changes or alterations as may be found convenient or necessary in the progress of the work," if the general plan contemplated the use of an old sewer, the commissioners, if they find it convenient and necessary, may abandon that part of the plan, and construct a new sewer in place of the old one. Of this the commissioners are the sole judges, and having acted thereon, this court has no authority to review their decision. *The State, Piard, v. Mayor and Common Council of Jersey City*, 148
The State v. Water Commissioners, *Ib.*
2. The charter requires the signature of the mayor to all resolutions af-

fecting the interests of the city; held, that a resolution of the common council referring a petition for a sewer to the committee on sewerage does not require the signature of the mayor. *Ib.*

3. By the act of 1854, (*Laws* 1854, 404,) the legislature intended, after the general plan of sewerage was adopted by the city, to secure the execution of it by the water commissioners, and to take from the mayor and common council all duties and authority respecting it, except on application, after giving notice and hearing objections, to determine *the time when* the work, or any part of it, should be done. *Ib.*

See ASSESSMENT.

JERSEY CITY CHARTER.

WILL.

See DEVISE.

WITNESSES.

1. In a suit in which husband and wife are joined as parties, neither is a competent witness for or against the other. *Handlong and Wife v. Barnes*, 69
2. Under the "act concerning witnesses," (*Nix. Dig.* 928), neither husband nor wife, in any suit or proceeding in which they are joined as parties, is a competent witness for or against the other. *Ib.*
3. Under the same act, neither party can be sworn when the other party is prohibited by any legal disability. *Ib.*



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